IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 257.

J. F. SHEPARD, N. LOGAN, W. H. BILLING et al.,
Appellants,

vs.

JAMES M. BARKLEY, Moderator of the General Assembly and Chairman of the Executive Commission of the General Assembly of the Presbyterian Church in the United States of America et al.,
Appellees.

J. W. DUVALL et al.,
Appellants,

vs.

THE SYNOD OF KANSAS of the Presbyterian Church in the United States of America et al.,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLANTS' STATEMENT, BRIEF AND ARGUMENT IN REPLY.

CHARLES E. MORROW,
Solicitor for Appellants.

St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1819.

INDEX.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 257.

J. F. SHEPARD, N. LOGAN, W. H. BILLING et al.,
Appellants,

vs.

JAMES M. BARKLEY, Moderator of the General Assembly and Chairman of the Executive Commission of the General Assembly of the Presbyterian Church in the United States of America et al.,
Appellees.

J. W. DUVALL et al.,
Appellants,

vs.

THE SYNOD OF KANSAS of the Presbyterian Church in the United States of America et al.,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLANTS' STATEMENT, BRIEF AND ARGUMENT IN REPLY.

STATEMENT.

Question of Jurisdiction.

One of the grounds on which the complainants invoked the jurisdiction of the United States District

Court was that the suits arose under the Constitution and laws of the United States.

In the bills in these cases (the allegations in both bills being the same), the appellees (Rec., pp. 2, 12, 27, 32) (in the Church case), said:

> "This suit as hereinafter shown also arises under the Constitution and laws of the United States * * *"
>
> "13. The defendants claim that:
>
> *(a)* Under the law of Missouri, as decided in October, 1909, by the Supreme Court in that state in the case of Boyles v. Roberts, 121 S. W. Reporter, 805, the Court can, regardless of any decision by church authorities heretofore or hereafter made, determine whether the creed and doctrine of the merged church is the same as that of the former Cumberland Church, and if not, then the property is, without more, forfeited to those who have refused to follow the merged church or abide by the merger.
>
> *(b)* There was, in fact, such departure in creed and doctrine by those who followed the merged church, whereby all the property formerly owned by the Cumberland Church was forfeited to and became that of the defendants and the class of persons represented by them."

Then the appellees in their bills, after saying the above, which, standing alone, might be questionable and might, if not modified, lend color to their position

in this court when they met to defeat the jurisdiction of the Court, went further in their bills and said:

> "Against such claims **and in support of,** AND AS ONE OF THE GROUNDS OF THEIR COMPLAINT, complainants invoke the protection of the Fourteenth Amendment to the Constitution of the United States, which prohibits the state from making or enforcing any law which abridges the privileges and immunities of complainants, from taking without due proces of law the property of the Presbyterian Church, and from depriving complainants of the equal protection of the law. Under that amendment complainants and each person represented by them, have the right and privilege of membership in their church, to contract therefor with other members, to have the church creed and doctrine and membership determined by the church authorities, and to have enforced the trust upon which the property is held so as to be applied to the use of those who complied with the church rules and regulations and the creed and doctrines as by the church authorities determined to exist. **So complainants and those represented by them** INVOKE THE PROTECTION OF THAT AMENDMENT against the forfeiture of their interest in the church property (held in trust for those following the creed and doctrine as from time to time declared by church authorities), if and when a Court may attempt to decide that they follow a different creed and doctrine from that in existence when the property was acquired. THEY ALSO INVOKE THE AID AND PROTECTION

OF THAT AMENDMENT IN HAVING ACCORDED TO THEM THE EQUAL PROTECTION OF THE LAW. The State Constitution gives to all persons freedom as to religious views, practices and beliefs. There is thus accorded to others said rights, but they are denied to complainants and those for whom they sue, in that they are denied the privilege of following the creed and doctrine of their church as same may, in accordance with the contract of church membership, be from time to time amended, changed or promulgated, as determined by the proper church judicatories, but are required as a condition to membership to always confine themselves to the creed and doctrine which may be judicially determined by the civil courts to be the doctrine of such church. So under the law of Missouri, any other voluntary association can have and maintain judicatories which are the sole and exclusive judges of membership, and when the same is forfeited, which right is, if the claim of defendant be well founded, denied to other religious associations, for that the test of continued membership is made dependent upon a finding of the civil courts of what is the creed and doctrine at the time adopted and followed by such church" (Rec., pp. 12-13).

And in the answer appellees say in their brief that the appellants here, defendants below, disclaimed any intention to assert any such defense made by the appellees in their petition with reference to the protec-

tion of the Constitution and laws of the United States. This is not the case.

While the answers denied formally that the case arose under the Constitution and laws of the United States; denied that they made "any claim in the manner and form" as stated in subdivision *(a)* of paragraph 13 of the complaint (for the defendants could not well admit that the law of Missouri as decided in this case of Boyles v. Roberts which the complainants sought to annul was unconstitutional); yet they pleaded the case of Boyles v. Roberts, 222 Mo. 613, and relied upon that as the law of Missouri (see Rec., p. 554), and it was further alleged that by reason of the law of Missouri, as thus decided by its highest court, that the alleged union of the two churches was invalid, that same had never been legally consummated and that defendants claimed and averred that the alleged merger and union were void and of no effect and that it became the duty of all officers and members of both churches of Missouri to abide by the judgment in that case and no longer to dispute or contend to the contrary, and that the title, both legal, beneficial and equitable, of all property, both real and personal, in the State of Missouri, belonging before said alleged union to the Cumberland Church or any of the associations, organizations or agencies, controlled by it or in which it was beneficially interested, remained and continued to vest in

said church, precisely the same as before, and further claimed and averred that all of the former members of the Cumberland Church who did not so acquiesce and abide by the said judgment had become members of a different body and organization, to wit, the Presbyterian Church, and that by so doing they had relinquished and surrendered all their right, title and interest in any property in Missouri held or owned by the Cumberland Church (Rec., pp. 554-555). The answer in the college case on these questions was the same. It will thus be seen that under the issues joined, in the court below, the grounds of jurisdiction asserted by the complainants were not only diverse citizenship, but that the action arose under the laws and Constitution of the United States; that issues were joined upon these grounds, the evidence heard, argued, submitted, and must have been decided upon both of these grounds, because the law of Missouri was not followed and the complainant's contention was sustained. The appellees can not now be heard to say that this Court is without jurisdiction and the appellants must be denied their right to be heard here on a question of large national interest where a constitutional question was raised in plain language in their bills and the jurisdiction of the court below was plainly invoked by them on that ground.

The complainants in their bills invoked the protection of the Fourteenth Amendment to the Constitution of

the United States in plain language and charged that a law of the State of Missouri, as promulgated by the Supreme Court of the State of Missouri in the case of Boyles v. Roberts, 222 Mo. 613, deprived the complainants of their property without due process of law; denied them the equal protection of the law and denied them certain privileges and immunities guaranteed by said Fourteenth Amendment. All of these things were pleaded **"in support of and is one of the grounds of their complaint"**. No doubt this charge in the bill was made in good faith by the complainants, but, in any event, they are estopped to deny the truthfulness of these allegations in their bills.

Cooke v. Avery, 147 U. S. 375.

POINTS AND AUTHORITIES.

I.

The complainants alleged in their bills of complaint that the law of Missouri, as decided in Boyles v. Roberts, 222 Mo. 613, was in violation of the Fourteenth Amendment to the Constitution of the United States and was threatened to be and was being enforced against the complainants. The bills of complaint raised a constitutional question which gave the District Court jurisdiction and gives this court jurisdiction of the appeal.

Savage v. Jones, 225 U. S. 501;
Lobe v. Columbia Township Trustees, 197 U. S. 472.

II.

The right of appeal from the Circuit Court of Appeals to the Supreme Court is given by the Act of Congress which gives the right of appeal in any case in which it is "claimed" that the law of a state is in contravention of the Constitution of the United States. The "claim" to give this right of appeal need not necessarily be in the pleadings of the party invoking the jurisdiction of the court. It is sufficient if such

right is claimed in the case. The statute is silent as to how this claim shall be made.

> Holder v. Altman, 169 U. S. 81, *l. c.* 88-89;
> Field v. Barber Asphalt Co., 194 U. S., *l. c.* 621;
> Penn. Insurance Co. v. Austin, 168 U. S. 685;
> David & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207.

A controversy arising under the Constitution of the United States involves adverse parties and consists of the right of one party as well as the other. The controversy is made up equally and essentially of both adverse claims, and if either arise under the Constitution the case or controversy must so arise.

> Cohen v. Virginia, 7 Wheat. 1, *l. c.* 397;
> Nashville v. Cooper, 6 Wall. 247.

The right or immunity need not be created by Federal laws. It is sufficient that the right be one protected by the Constitution from whatever source it may spring.

> New Orleans v. De Armas, 9th Pet. 224.

III.

The law of a state is what the highest court of the state decides is the law. It is not necessary that the law be enacted by the State Legislature. It is suffi-

cient if decided and declared by the highest court of the state.

Holmes v. Jennison, 14 Pet. 540.

IV.

A Federal question is presented by a pleading which invokes the guaranty of equal protection of the law under the Fourteenth Amendment to the Constitution, which is plausible on its face, and gives jurisdiction, although the Court may decide that the party so invoking it has not been denied the equal protection of the law.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89.

It makes no difference which way the alleged constitutional question was decided, this court has jurisdiction to pass upon the whole case and all questions arising in it.

Field v. Barber Asphalt Co., 194 U. S. 618, *l. c.* 621;
Penn. Life Insurance Co. v. Austin, 168 U. S. 685.

This is true, although the Federal question so raised by the bill is not decided by the Court or the case is decided on local or state questions only, and the court

will not lose jurisdiction by omitting to decide the Federal question or by deciding it adversely to the party claiming its benefit. In such case this court also has jurisdiction on appeal and can decide the case on any ground, state or Federal, on which it desires to place its decision.

Siler v. L. & N. R. R. Co., 213 U. S., *l. c.* 191.

But the District Court, in rendering a decree on the merits, necessarily decided the constitutional question raised in the bills and involved in the cases.

Mississippi, Etc., v. L. & N. R. R. Co., 225 U. S. 272.

The power to review attaches to these cases because of the "claim" that the law of Missouri violates the Constitution, and this claim makes it the duty of this Court to determine all questions involved in the case.

Brolan v. United States, 236 U. S. 216;
Williamson v. United States, 196 U. S. 283;
Billings v. United States, 232 U. S. 261, 276.

The jurisdiction of this court on appeal does not depend upon the question whether the right claimed under the Constitution has been upheld or denied in the court below, and the jurisdiction of this court is not

limited to the constitutional question, but goes to the whole case.

Holder v. Altman, 169 U. S., *l. c.* 88-89;
Field v. Barber, 194 U. S., *l. c.* 621;
Penn. Insurance Co. v. Austin, 168 U. S. 685;
Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, *l. c.* 216.

V.

The protection of the Fourteenth Amendment refers to the judicial authorities of a state as well as the Legislature and executive officers. Whoever, by virtue of his public office under a state government, deprives another of any right protected by this amendment against deprivation by the state, violates this constitutional inhibition and as he acts in the name of the state and is governed by the state's power, his act is that of the state.

Ex parte Virginia, 100 U. S. 339;
Neal v. Delaware, 103 U. S. 370;
Yick Wo v. Hopkins, 118 U. S. 356;
Gibson v. Mississippi, 162 U. S. 565;
Chicago, Etc., Railroad Co. v. Chicago, 166 U. S. 226.

ARGUMENT.

Of Jurisdiction.

The appellees contend that this Court is without jurisdiction because, as they say, the bills of complaint which they filed in the District Court and in which in plain language they invoked the jurisdiction of the Federal Court, **"as one of the grounds of their complaint"**, and **"invoked the protection"** of the Fourteenth Amendment to the Constitution of the United States to prevent the forfeiture of their property, and "also invoked the aid and protection of that amendment in having accorded to them the equal protection of the law", because the law of the State of Missouri, as declared by the highest court of that state, in the case of Boyles v. Roberts, 222 Mo. 613, violated the Fourteenth Amendment to the Constitution of the United States and denied them the equal protection of the law; took their property without due process of law and abridged their privileges and immunities as citizens of the United States in violation of said amendment, was not sufficient to give the District Court jurisdiction on the ground that a constitutional question was involved.

It will be remembered that when the complainants

brought these suits, the Supreme Court of Missouri, in the case of Boyles v. Roberts, *supra*, involving the same controversy in Missouri, had decided that the merger of the Cumberland Presbyterian Church into the Presbyterian Church, was void, and that the property of the Cumberland Church did not pass to the Presbyterian Church. The purpose of these bills was to have that law, as decided by the highest court of Missouri, declared unconstitutional and void as against the complainants. The jurisdiction of the Federal Court was especially invoked by the complainants as one of the grounds of their complaint, and they assailed the law of Missouri as being unconstitutional because it denied them the equal protection of the law; took their property without due process of law and abridged their privileges and immunities as citizens of the United States, all of which claims the complainants alleged were protected by the Fourteenth Amendment to the Constitution of the United States. The fact that the Supreme Court of Missouri, after this case was heard and decided in the District Court, and while it was on appeal in the United States Circuit Court of Appeals in a subsequent case overruled that decision, can in no way effect the jurisdiction of the District Court or the jurisdiction of the United States Circuit Court of Appeals or this court. Of course, the fact that the appellees were successful in the District Court and the United

States Circuit Court of Appeals, and no longer need the aid of this Court to declare said law to be unconstitutional, as they alleged, relieves them of their anxiety in the matter, but it does not deprive this Court of jurisdiction. The claim that the cases arose under the Constitution and laws of the United States, of course, was made by the complainants in good faith, but in any event, they are estopped to deny in this court that said claim was not made in good faith. The allegations of the bill were sufficient to give the District Court jurisdiction on the ground that a constitutional question was involved, and that Court, having thus acquired jurisdiction, did not lose it, by anything transpiring thereafter, in the progress of the cause, and this Court has jurisdiction on appeal.

It is contended by the appellees that the answer of the defendants denied that any constitutional question was involved. But this is not true. The answer admitted the law in Missouri as decided in the case of Boyles v. Roberts, but of course claimed that said decision and said law did not violate the Constitution of the United States. But the answers in both cases invoked that decision as the law of Missouri and claimed that the law so declared was constitutional and under that law claimed all the property involved in these suits. Under these circumstances it surely can not be said that the defendants took the alleged constitutional question out of the case, by asserting

that this law was valid, and by expressly joining issue on this constitutional question, even if by so alleging the defendants could take the question out of the case, which we deny.

Where a Federal question is raised by a bill in good faith, the Court acquires jurisdiction and can decide the case on local or State questions only and will not lose jurisdiction by omitting to decide the Federal questions or by deciding them adversely to the party claiming their benefit. This Court in such case has jurisdiction on appeal.

> Silver v. L. & N. Railroad Co., 213 U. S., *l. c.* 191.

In the last case cited it is said:

> **"The Federal questions as to the validity of the State statute, because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that Court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or State questions only."**
>
> **"This Court has the same right and can, if it deems proper, decide the local questions only and omit to decide the Federal questions or decide them adversely to the party claiming their benefit."**

In both of these cases the complainants charged in their bills of complaint that the Supreme Court of Missouri had declared the law of Missouri in the case of Boyles v. Roberts, above referred to, and that the law of Missouri as thus declared by its highest court was in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that "No State shall make **or enforce** any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws". The complainants, in their bills, alleged that this law had been and was being enforced and was threatened to be enforced against them, and that it abridged their privileges and immunities as citizens of the United States and deprived them of their property without due process of law and denied to them the equal protection of the law.

The prohibitions of the Fourteenth Amendment refer to the judicial authorities of a State as well as the legislative and executive authorities. Whoever, by virtue of his public office under a State government, deprived another of any right protected by that amendment, against deprivation by this State, "violates the constitutional inhibition, and as he acts

in the name of the State and is clothed with the State's power, his act is that of the State".

> *Ex parte* Virginia, 100 U. S. 339;
> Neal v. Delaware, 103 U. S. 370;
> Yick Wo v. Hopkins, 118 U. S. 356;
> Gibson v. Mississippi, 162 U. S. 565;
> Chicago, Etc., Railroad Co. v. Chicago, 166 U. S. 226.

Clearly under the pleadings in these cases the complainants contended that the law of Missouri was unconstitutional and the defendants contended that said law was constitutional and relied upon the same. In any view of the case, there was a "case or controversy arising under the Constitution of the United States".

In interpreting the constitutional grant it has been laid down by great authority that in order to constitute a **case** or **controversy** arising under the Constitution, laws or treaties of the United States it is not necessary that the plaintiff immediately in his petition or opening complaint demands something conferred upon him by the Constitution or a Federal law or treaty. A case or controversy in law or equity ordinarily involves adversary parties, and consists of the right of one party as well as the other. The case or **controversy** is made up equally and essentially of both of these adverse rights, and if either of them

arise, under the Constitution, law or treaty, then the case or controversy must so arise.

> Cohen v. Virginia, 6 Wheat. 1, *l. c.* 379;
> Nashville v. Cooper, 6 Wall. 247.

In Cohen v. Virginia, *supra*, Chief Justice Marshall said:

> "A case in law or equity consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."

In Nashville v. Cooper, *supra*, this Court said (*l. c.* 253):

> "The rule applies with equal force where the plaintiff claims a right and where the defendant claims protection by virtue of one or the other,"

that is, where the right claimed is under the Constitution or law of the United States.

This Court has uniformly held that a Federal question is presented by a pleading which invokes the protection of guaranty of equal protection of the law, under the Fourteenth Amendment to the Constitution of the United States, which is plausible on its face; and that such an allegation in a pleading

gives the Federal courts jurisdiction regardless of how the question may afterwards be decided.

> American Sugar Refining Co. v. Louisiana, 179 U. S. 89.

The allegation in the complainant's bills that the law of Missouri as declared in Boyles v. Roberts, 222 Mo. 613, which it was alleged was in violation of the Fourteenth Amendment to the Constitution of the United States, was threatened to be enforced against complainant, raised a constitutional question, and gave the District Court jurisdiction.

> Savage v. Jones, 225 U. S. 501.

The District Court, in rendering the decree on the merits, necessarily decided the constitutional question alleged and involved in the bills.

> Mississippi, Etc., v. L. & N. R. R. Co., 225 U. S. 272.

The right of appeal from the Circuit Court of Appeals to this court is given by the Act of Congress which gives the right of appeal in any case in which it is "claimed" that the law of a state is in contravention of the Constitution of the United States. This "claim" to give this right of appeal need not necessarily be in the pleading of the party invoking the

jurisdiction of this court. "**It is sufficient if such right is directly claimed in the case. The Constitution is silent as to how this claim shall be made.**"

Field v. Barber Asphalt Co., 194 U. S., *l. c.* 621.

Under the Act of Congress "**the jurisdiction of this court on appeal does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below, and the jurisdiction of this court is not limited to the constitutional question, but goes to the whole case.**"

Holder v. Altman, 169 U. S. 81, *l. c.* 88-89;
Field v. Barber Asphalt Co., 194 U. S., *l. c.* 621;
Pennsylvania Insurance Co. v. Boston, 168 U. S. 685;
Davis & Farnum Mfg. Co. v. Los Angeles, 198 U. S. 207, *l. c.* 216.

It makes no difference which way the alleged constitutional question was decided, this court has jurisdiction to pass upon the whole case, and all questions arising in it.

Field v. Barber Asphalt Co., 194 U. S. 618, *l. c.* 621;
Pennsylvania Life Insurance Co. v. Austin, 168 U. S. 685, *l. c.* 694.

In the case last cited Mr. Chief Justice White said:

> "By the Fifth Section of the Act of March 3, 1891, c. 517, 26 Stat. 826, creating the Circuit Court of Appeals, jurisdiction is given to this court to review by direct appeal any final judgment rendered by the Circuit Court, 'in any case in which the Constitution or law of the state is claimed to be in contravention of the Constitution of the United States'. There can be no doubt that the case at bar comes within this provision. The complainants in their bill in express terms predicate their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the City of Austin and an Act of the Legislature of the State of Texas, referred to in the bill, impaired the allegations of the contract, which the bill alleged had been entered into with the complainants by the City of Austin and that both the law of the State of Texas and the city ordinances were in contravention of the Constitution of the United States. **No language could more plainly bring a case within the letter of the statute than do these allegations of the bill bring this case within the law of 1891.**"

In support of the unique and unprecedented position of appellees in this court, that notwithstanding the plain language of their bill in the lower court, invoked the jurisdiction of the Federal tribunal on the ground that the case arose under the Constitution and laws of the United States, that this court is with-

out jurisdiction on appeal, they cite a number of cases. All of these cases, it will be seen on examination, are cases where the defendants in the court of first instance contended that the bills filed by the complainants did not give jurisdiction, and they raised and asserted that proposition by answer or demurrer and continued so to assert it until final adjudication in this court. The holding of all these cases is that where original jurisdiction is sought to be asserted, on the ground that a right or immunity under the Constitution and laws of the United States is being encroached upon, that fact must be asserted in the petition or declaration and not rest upon anticipation of the answer later to be filed by the defendants. This proposition, of course, must necessarily be true, for the reason that the defendant may never make any such claim in his pleadings. In these cases the complainants, **"as one of the grounds of their complaint"**, invoked the jurisdiction of the lower court on the ground that the case arose under the Constitution and laws of the United States. The complainants' bills gave the lower court jurisdiction and this court has jurisdiction on appeal, and appellees' motion to dismiss should be overruled.

Respectfully submitted,

CHARLES E. MORROW,

Solicitor for Appellants.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1917.
No. 257.

J. F. SHEPARD, N. LOGAN, W. H. BILLING, ET AL.,
APPELLANTS,

vs.

JAMES M. BARKLEY, MODERATOR OF THE GENERAL AMMESBLY AND CHAIRMAN OF THE EXECUTIVE COMMISSION OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, ET AL.,
APPELLEES.

J. W. DUVALL, ET AL.,
APPELLANTS,

vs.

The SYNOD OF KANSAS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMRERICA, ET AL.,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPELLANTS' STATEMENT, BRIEF AND ARGUMENT.

CHARLES E. MORROW,
Solicitor for Appellants.

MAX D. ABER,
Of Counsel.

INDEX.

POINTS AND AUTHORITIES.

LIST OF AUTHORITIES.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1917.
No. 257.

J. F. SHEPARD, N. LOGAN, W. H. BILLING, ET AL.,
APPELIANTS,

vs.

JAMES M. BARKLEY, MODERATOR OF THE GENERAL AMMESBLY AND CHAIRMAN OF THE EXECUTIVE COMMISSION OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, ET AL.,
APPELLEES.

J. W. DUVALL, ET AL.,
APPELLANTS,

vs.

The SYNOD OF KANSAS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMRERICA, ET AL.,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPELLANTS' STATEMENT, BRIEF AND ARGUMENT.

STATEMENT OF THE CASE:

These two cases were consolidated and tried as one in the District of Missouri, at Kansas, City, and there was a decree in favor of the complainants quieting the title to all of the property involved, and from this decree, an appeal was taken by the defendants in the consolidated case, to the United States Circuit Court of Appeals for the Eighth Circuit, which appeal was heard as one case upon one record, and briefed as one case, and decided at St. Louis, and the judgment of the District Court was affirmed in an opinion written by Judge Carland in which Judges Hock and Amidon concurred. (R 735.)

Afterwards, on the 16th day of June, 1916, an appeal was duly allowed the appellants herein by Mr. Justice Vandeventer of this Court. (R. p. 747.)

This is not a case in which the decree of the Circuit Court of Appeals is made final, but it is a case wherein the jurisdiction of the District Court did not depend entirely upon diverse citizenship of the parties, but was also dependent and the jurisdiction of the Federal Court was invoked by the complainants upon the further ground that the suit arose under the Constitution and laws of the United States. (R. p. 2; 27.)

The complainants in these suits are the Synod of the Presbyterian Church in the Unitel States of America in the college case, and certain officers and members of said Church and claiming to be representatives of all others similarly situated and to represent said Church. The Defendants are Missouri Valley College and certain officers and members and trustees of the Cumberland Presbyterian Church, and, it is claimed that they represent a class of persons too numerous to join in said action, but that they fairly represent the entire class of persons interested in the subject matter of said actions and making claim to the property sued for.

Prior to the year 1906, the Cumberland Presbyterian Church which will hereafter be referred to as the Cumberland Church and the Presbyterian Church in the United States of America which will hereafter be referred to as the Presbyterian Church were separate and distinct religious societies existent in the United States. The latter as existent in the United States dates from the first meeting of its General Assembly in 1789 and was made up in large part if not wholly from these who had brought the traditions of Presbyterianism from those in Scotland who had dissented from the Church of England, and had formed the Presbyterian Church as their vehicle for expression of such dissent and promulgation and maintenance of their views. The Cumberland Church was formed, in like manner, by and from the revolt of three ministers, King, Ewing and McAdoo,

who had been ministers of the Presbyterian Church, but found themselves in large doctrinal dissent therefrom, in Tennessee between the years 1805 and 1810, in which latter year the first Presbytery of the Cumberland Church was formed. This was known as the Cumberland Presbyterian, at Cumberland Tennessee. In 1813, the growth having been rapid, it was divided into three presbyteries and a Cumberland Synod was formed. Upon the formation of this Synod, a confession of faith was adopted. Portions of this confession of faith were like that of the Presbyterian Church and were practically like the fundamental statements of other Protestant religious bodies. The wide divergence therefrom was in that it dissented wholly from the Calvinistic doctrine of predestination, and gave its adherence to a theology embodying the doctrine of justification by faith, occupying a middle ground between the Armenian school of theology and that of the Calvinist.

Prior to 1829, the number of Presbyteries and Synods had largely increased, a General Assembly had been formed and in that year a Constitution for the government of the Church was adopted. In 1883, this constitution was revised, and pertinent portions from this revision as well as the original Constitution of 1829 are in evidence in this case. By 1906 the membership had increased to 185,212, the number of congregations to 2,869, of ministers to 1,514, with 114 Presbyteries and 17 Synods.

This membership was not made up from the

Presbyterian Church, but was a result of the preaching of the particular doctrine of the Cumberland Church, particularly among the early settlers in Kentucky, Tennessee, Missouri, Arkansas, Illinois and other States in that section of the United States who gave largely of their meagre means for the erection of church buildings, schools and other properties for spreading the faith of the church to which they gave their allegiance.

Prior to the formation of the Cumberland Synod in 1813 the original Cumberland Presbytery in 1810, 1811 and 1812 by circular letter, and in the latter year by a resolution, expressed a desire or purpose that the Presbytery had always been and then was ready and willing for union with the general Presbyterian Church on "Gospel principles." After the formation of the Synod in 1813 no action was taken looking toward union until 1860 when a resolution was adopted expressing the desire of the General Assembly for a union of the great Presbyterian family and to see all the branches thereof represented in one General Assembly. In 1867 the Cumberland General Assembly negotiated with the Southern Presbyterian Church for a union therewith. This failed because of the difference in theological bases. Some negotations are shown by the record to have been had between the Cumberland Church and the Presbyterian Church toward a union in 1873, and in 1882 some efforts were made for a union with the Evangelical Reform Church.

Apparently, as a result of these efforts and for a determination of the policy of the Church in future, in 1883 its Constitution, which had been adopted in 1829 and which was silent upon the power of the General Assembly in such respect, was revised and the power conferred by Section 43,—"*To receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church.*" (R. p. 321). This same revision further expressing the policy of the Church, in its investiture of power upon its different bodies of sessions, presbyteries, synods and general assembly, provided in Section 25 that"*The jurisdiction of these courts is limited by the express provisions of the constitution.*" (R. p. 318) The Constitution of 1829 was wholly silent as to methods of amendment of the Constitution. The rivised Constitution adopted in 1883, provided a means for amending (Record p. 321-2) the confession of faith, catechism, constitution and rules of order upon being approved by a majority of the presbyteries after having been passed by a two-thirds vote of the General Assembly and transmitted to them for their action by the general assembly; the general regulations, directory for worship and rules of order may be amended by a vote of two-thirds of the entire number of commissioners enrolled at a meeting of the general assembly, provided such amendment or change should not conflict in letter or spirit with the confession of faith, catechism or constitution.

At the general assemblies of the Presbyterian

and Cumberland Churches held in 1903, proposition were made for a union of the two churches under the name of the Presbyterian Church. Committees were appointed to confer upon a basis of union and to report at the assemblies to be held the following year. The committees agreed upon terms of union and reported as directed. The report so made was adopted by a majority of each of the general assemblies held in 1904, and by vote of the Cumberland general assembly, the matter was referred back to the different presbyteries for their action. This report or reference did not take the form of a proposition for amendment of the constitution. There was no provision of the Constitution for entertaining such proposition, or for submitting same to the presbyteries. Sixty of the 114 presbyteries were returned as having voted to approve the proposition of union so submitted to them, and the returns so made were canvassed by the general assembly of 1905. In May, 1906, the general assembly of the Cumberland Church met in Decatur, Illinois, and adopted the report of the Committee on union which had been canvassed at the general assembly of the previous year, but before such vote of adoption, a protest was made to the Assembly by those opposed thereto challenging the authority of the general assembly to adopt the report or to enter into the union in any way, for the reason that there was no constitutional warrant therefor, because no action had been taken by the assembly looking to the adoption of the form of government, rules of discipline and directory

of worship of the church with which the union was sought to be made as provided by the second paragraph of Section 60 of the Cumberland constitution, reciting the wide differences in the respects last mentioned of the Presbyterian from the Cumberland organization, the want of authority for submission of the proposed plan of union to the presbyteries, and for numerous other reasons fully set forth on pages 281-2 and 3 of the Record. The protest was disregarded and the presiding officer declared the union consummated. Adjournment was taken to the same time and place as that previously selected for the next general assembly of the Presbyterian church. Before adjournment was taken, the commissioners opposing and who held the invalidity of the union, objected to such adjournment for the reason that there was no authority for an adjournment which was in effect an adjournment without day and announced that the assembly would be continued as an Assembly of the Cumberland church, which was done by such Commissioners, adjournment thereafter duly had to a time and place fixed for a general assembly of the Cumberland church and annual general assemblies have been since that time regularly been held and had as theretofore.

While a small majority of the presbyteries, counted as such, were returned as favoring the proposition submitted, the large and populous presbyteries were among those dissenting, and the larger dissent was among the lay represen-

tatives. In the presbyteries, 691 ministers favored the union while 470 were opposed; 649 lay delegates favored, while 1007 opposed; the total individual votes, counted as such, were 1340 for the proposed union, with 1477 opposed. Of the 185,212 members on and prior to May 24, 1906, more than 100,000 remained with the Cumberland Church, refusing to accept the union. The appellees in these causes, however, claim the property of the Cumberland Church by virtue of the proceedings had, in the unauthorized manner.

THE GENERAL CHURCH CASE.
THE BILL OF COMPLAINT.

The bill in this case was filed December 8, 1909. The complainants were "James M. Barkley, Moderator of General Assembly and Chairman of the Executive Commission of the General Assembly of the Presbyterian Church in the United States of America, and William H. Roberts, Stated Clerk of the General Assembly and Secretary of the Executive Commission of the General Assembly of the Presbyterian Church in the United States of America, individually and as such officers and representatives of the members of the Presbyterian Church in the United States of America.

Twenty-eight persons were made defendants, Hugh Hayes being the first one named (Rec., p. 1).

The bill of complaint (Rec., pp. 2-13) alleged

the complainant Barkley to be a citizen of the State of Michigan, the complainant Roberts a citizen of the State of Pennsylvania, and all the defendants citizens of the State of Missouri.

The bill stated that the Presbyterian Church in the United States of America, for convenience sake called in the bill the "Presbyterian Church," was and had been for years a voluntary religious association and organization, consisting of a great number of individuals. That the Cumberland Presbyterian Church, for convenience called in the bill the "Cumberland Chuch," was for years a like voluntary religious organization in the United States, also with a large number of members.

That in May, 1906, the said Presbyterian Church became merged, as shown later on in the bill, with the Cumberland Church, and since that time, as a consolidated and merged association, had continued to exist in the name of the Presbyterian Church in the United States of America; that the complaints were members, communicants and officers of its General Assembly; that the complaintant Barkley was Moderator of the General Assembly and Chairman of the Executive Commission of the General Assembly of the Presbyterian Church; that the complainant Roberts was the Stated Clerk of the General Assembly, and Secretary of the Executive Commission of the General Assembly of the Presbyterian Church; and that said complainants, as such officers and members of the

Presbyterian Church were truly representative of all the members of that Church.

That the bill was brought, not only on behalf of the complainants individually and as such officers, but also on behalf of all other members having an interest in the matters in controversy, a very large part of whom were residents of states other than Missouri, their number being so large that it was inconvenient to attempt to join them as complainants in the bill.

That the defendants had, before the alleged merger, been members and communicants of the Cumberland Church, that they still claimed to be such members and communicants and that the church organization still existed and that the alleged merger and amalgamation was ineffectual, null and void. It was said that the defendants represented a class of persons so large that it was inconvenient to make them all parties, so that each one of the defendants was sued, not only as a party in his own right, but as fairly representing the entire class of persons in his local congregation of the church and in Missouri who made the same claim and took the same position as to the continued existence of the Cumberland Church and the invalidity and nullity of the alleged merger and consolidation of the two churches.

The bill then proceeded to state that the Presbyterian Church, both before and since the merger, was subdivided into local congregations,

worshipping in local structures located upon property held for the purpose; that such property was acquired with funds contributed for the purpose, and held by trustees for said churches, and as a convenient place for local worship, under the direction, control and management of the Presbyterian Church, which was asserted to be the real owner of the equitable title thereto, permitting, for the purpose of convenience, its immediate use by such persons as might, under its rules and regulations and subject to its direction, be permitted to there worship and be communicants; that the property was held in trust for the teaching by the church of such creed and doctrine as might, from time to time, be fixed, determined, amended and promulgated by the judicatories of the church.

The bill averred that in the Presbyterian Church, both before and since the merger, there were, by virtue of a written constitution, certain church courts, judicatories and organizations, consisting of "Sessions," "Presbyteries," "Synods" and "General Assembly," the latter being the highest court in the organization. The bill stated that those courts had the power to determine for all who belonged to the church, all matters of creed and doctrine, church law and government, ecclesiastical control and rights of membership, including the use to which the property might, from time to time, be put, and also to decide what, if any, changes in creed and doctrine could be made, to what extent members were bound thereby, when mem-

bers had seceded from the church, and when they lost their membership and interest therein, no member having any interest in the property except as incident to his membership in the organization; that the Presbyterian Church, through its said judicatories, had a direct interest in the properties afterwards described in the bill, because they had the sole right to determine the nature of the use to which any church property should be put, who should use the same, such use being incident to membership, and the final and exclusive power to determine when membership existed and when the right thereto ceased, thereby absolutely controlling the use of the property; that it also had the right to give directions as to the particular use of the property, and that the reversionary right or interest, upon the dissolution or disruption of the local congregation, was absolute in the church itself, so that it took the property with the absolute right of disposal thereof.

The bill then described the powers of the Session, the Presbytery, the Synod and the General Assembly. It was averred that among the powers vested in the General Assembly was that of finally deciding when, under what circumstances and upon what terms the church might merge, amalgamate and consolidate with another; that all these rights were vested, by virtue of an alleged contract between the members, evidenced by a constitution, rules and regulations and by said contract of membership; and that each member of the church had agreed that

all such questions should be thus, and in no other manner, determined and decided.

The bill averred that the Cumberland Church, at all times before the alleged merger, had a similar organization and various local church congregations which worshipped in buildings and used property in different places in Missouri, some of which were more particularly described later in the bill; that all said property was acquired by said church and held in trust for it, not to be used by those professing a particular creed and doctrine in existence at the time of its acquisition, but to be used by and for the denomination whose doctrine and creed should be such as from time to time might be determined by the judicatories of the church, so that if it should be amalgamated and merged with another church, the trust would pass to and become binding upon the merged body; and that each member of each of the constituent churches, as merged, had, by virtue of the merged and his membership in the merged church, a direct and beneficial interest in the property, which thereby became subject to the use of the united churches.

That before the merger the two churches had substantially the same doctrine and creed, and that they did by their respective Presbyteries and General Assemblies, who were fully authorized to act and bind all the members, enter into a contract, by which it was agreed that the two churches should be amalgamated, merged and

united into one church of the name of "Presbyterian Church in the United States of America," which should take, hold, succeed to and possess all the legal, corporate and property rights and powers of the separate churches, the same as if it were a continuance of each, and that the ministers, officers and membership of the two separate churches should be that of the consolidated church, with the same force and to the same extent as if the members of each church were admitted to and became members of the other; and that by the terms of said contract it was also agreed that the creed and doctrine of the new organization was no departure from that of either of the constituent churches, and that each member of each constituent church became a member of the merged church.

That thereafter the necessary steps were taken to carry out and complete the merger. That some of the former members of the Cumberland Church refused to abide by or enter into the new organization, and under its constitution, rules and regulations, were seceders, and not entitled to the benefit of membership in the united church.

It was further averred that at the time of the merger there were local congregations and church properties of the Cumberland Church at places mentioned later in the bill, and that at such places some of the former members of the Cumberland Church and communicants of the local congregations refused to recognize the

merger as legal, but declared the same to be invalid; that they refused to abide by the rulings of the church judicatories or to accept the creed and doctrine set forth in the contract and adopted by the churches, but that they seceded from the churches, and had by the church judicatories been treated as and decided to be seceders from the church, no longer having a membership therein.

It was further averred that these persons had conspired and confederated together to act in common and in concert and to attempt to keep up as legal the former separate organization of the Cumberland Church, and to seize, control and use for their own purposes all of the property formerly held by that church, and to exclude from the use thereof all former members who had recognized the merger or treated it as valid, and all members of the merged church. That they had seized and held possession of the church property and excluded from the use thereof all persons who had recognized the merger; that they threatened to institute suits as to each specific property to recover the title thereto, and to interfere with, molest and prevent the complainants and those represented by them from using the church property, houses of worship, parsonages and church funds.

It was averred that the defendants were among those who had so conducted and were conducted and were conducting themselves, and that they represented a class of persons too

numerous to be conveniently joined as defendants.

The bill then proceeded to designate the properties in different parts of the state, naming one or more of the defendants as representative of those persons who, in each locality, denied the validity of the merger and claimed for the membership of the Cumberland Church in the respective localities, the use of the church properties.

Certain persons were made defendants (Rec., p. 11), not because they sustained any special relation to any of the properties, but because it was said they represented what was claimed by them to be the Synod of Missouri of the Cumberland Church; and it was averred that they were engaged in inciting and furthering the conspiracy set out later in the bill, which had in view the taking from the Presbyterian Church in the United States of America and subjecting to their own uses and benefit the property mentioned in the bill.

The bill further averred that the complainants and those represented by them had an equitable and beneficial interest in all the real estate described, which they were entitled to have quited against the defendants and the persons acting with them.

It was further averred (Rec., p. 12) that the defendants claimed (a) that under the law of

Missouri, as decided by the Supreme Court of the State, the court could, regardless of any decision by church authorities, determine whether the creed and doctrine of the merged church was the same as that of the former Cumberland Church, and if not, then the property was, without more, forfeited to those who refused to follow the merged church or abide by the merger; and (b) that there was, in fact, such departure in creed and doctrine by those who followed the merged church, whereby all the property formerly owned by the Cumberland Church was forfeited to and became that of the defendants and the class of persons represented by them.

Against such claims the complainants invoked the protection of the Fourteenth Amendment to the Constitution of the United States.

The bill prayed (Rec., p. 13) for a decree quiting the title to all of the property in and to the Presbyterian Church, fixing and determining the interest acquired therein by virtue of the contract of merger; and that the defendants and all persons acting in concert with them be enjoined from interfering with the use by the complainants and by the members of the Presbyterian Church of any of the property in Missouri held by trustees for the benefit of the Cumberland Church at the time of the merger; and that an account might be taken of all the property in Missouri theretofore held in trust by the Cumberland Church, and that the same be impressed with the right of the Presbyterian

Church to its use, and that defendants be enjoined from interfering therewith.

Subsequently, an amendment to the bill was filed, describing other properties and making other persons defendants on their own account and as representatives of the class of persons who had some interest in the respective properties (Rec., pp. 14-24).

And then a second amendment was filed, bringing in an additional piece of property and two other defendants as representatives (Rec., pp. 25-6).

A demurrer to the bill was filed by the defendants, which was overruled. This has not been incorporated in the record.

A plea to the bill, for want of indispensable parties, was also filed. This was likewise overruled (Rec., pp.707-11).

This plea, which, by leave of court, was afterwards renewed and its matter incorporated in the answer, is, in order to avoid unnecessary repetition, omitted from the record.

The defendants afterward filed a joint and several answer to the bill of complaint (Rec., pp. 547-694).

THE ANSWER.

(1) The answer to the bill of complaint and its amendments denied that the controversy

in the suit was wholly between the complainants,Barkley and Roberts, on the one hand, and the defendants named in the bill of complaint and the amendments thereto, on the other; and it denied that the suit arose under the constitution and laws of the United States.

(2) It admitted, generally speaking, the averments of the bill as to the organization of the Presbyterian Church; it denied that in May, 1906, or at any other time, it became merged with the Cumberland Presbyterian Church, or that since that time it had existed as a consolidated or merged association.

The answer admitted that the complainants were members and communicants of said Presbyterian Church, and that at the time of the filing of the bill the complainant Roberts was an officer of its General Assembly, and that complainant Barkley was its Moderator, but denied that he was still such Moderator. It denied that the suit was brought by the complainants on behalf of any other members of the Presbyterian Church, or that they had any right to bring said suit on behalf of such other members; it denied any right of the compliants, or either of them, either individually or as officers of such General Assembly, to institute the suit; it averred that neither of them had any such interests in the matter as gave them the right to institute or maintain the action, or that they had any such connection with the Presbyterian Church and its General Assembly, or with the membership

of the Presbyterian Church as entitled them to institute the suit for any of the alleged members of the church, non-residents of this state, or that they had any interest in any of the property, real or personal, involved in the suit, or any interest entitling them to maintain said action, or any other action in relation to the title thereto or the possession thereof. If averred that neither the complainant, Barkley, as chairman of the so-called Executive Commission, nor Roberts as secretary thereof, had any interest in the property involved in the controversy which entitled them to institute and maintain the suit, or that so-called Executive Commission had any interest whatever in the property.

The answer denied that the membership in the Presbyterian Church was by contract between the members, evidenced and governed by the Constitution, Rules and Regulations, as constructed, recognized and enforced by the authorities of the organization; but it admitted that the Presbyterian Church had a Constitution, Rules and Regulation.

(3) The answer admitted that the Cumberland Presbyterian Church had been for ninety-six years before the year 1906, and ever since 1906 had been and still was voluntary religious organization in the United States, with a large number of members and communicants; of whom defendants were and still claimed to be part of such members and communicants. It denied that any merger

and amalgamation of the Cumberland Presbyterian Church with said Presbyterian Church took place in 1906 or at any other time; it admitted that the defendants claimed that the voluntary organization described as the Cumberland Presbyterian Church still existed, and that they claimed that the alleged merger and amalgamation was ineffectual, null and void; it admitted that the defendants, respectively, were members of the different local congregations of the Cumberland Presbyterian Church in Missouri, whose property and funds were involved in said suit.

The answer denied that any account should be taken in said action of any property in Missouri held in trust for the Cumberland Presbyterian Church; it also denied that the complainants had any interest in said property; it also denied that the defendants, respectively, or other members of their respective local congregations or any persons within the knowledge of the defendants were acting in concert with persons who were members of other congregations of the Cumberland Presbyterian Church, in excluding members of the Presbyterian Church from the use of any property in Missouri held in trust for the Cumberland Presbyterian Church.

(4) The answer denied that the Presbyterian Church, in its present organization and as it existed prior to the alleged merger, was subdivided, for the purpose of more convenient wor-

ship, government and control, into local congregations, worshiping in structures located upon property held for that purpose, or that such subdivision was assented to by all the members thereof; it admitted that the membership of the present Presbyterian Church, at the time and prior to the time of the alleged merger, was made up of numerous local congregations worshipping in local structures belonging to such congregations respectively, but it denied that the church at large or any of the courts thereof or the membership of any other local congregation had any interest or right of control in the property of any particular local congregation, unless the deed conveying the property gave such interest or right of control. It denied that the local property held by the local congregations was acquired with funds contributed for the purpose, and held by the trustees for said churches under the direction, control and management of the Presbyterian Church; it denied that the Presbyterian Church was the real owner of the equitable title thereto, or that it only permitted, for the purpose of convenience, the immediate use thereof by such persons as might, under its rules and subject to its direction, be permitted to worship there and be communicants. It denied that the property was held in trust for the teaching of such creed and doctrines as were, from time to time, fixed, determined, amended and promulgated by the judicatories mentioned in the bill, in any other sense than that the property was held in trust for the use and benefit of the particular local congre-

gation to which and for which it was conveyed.

(5) The answer admitted the existence in the Presbyterian Church of a constitution establishing a graduation of Church Courts, Judicatories, Presbyteries, Synods and General Assembly, mentioned in the bill of complainant, and that the General Assembly was the highest court of the church organization.

The answer denied that the complainants, as officers and members of the Presbyterian Church, were truly representative of all the members of said church, or that they had any right in their official, individual or representative capacity to maintain said suit. It denied that the courts and judicatories of the Presbyterian Church had any right or power to finally and exclusively determine, for all those who belong to the Presbyterian Church, all matters of creed and doctrine, church law and government, ecclesiastical control and rights of membership, or to decide the use to which the property might, from time to time, be put, or to decide what, if any changes in creed and doctrine might be made, or when the same had been made, or to what extent members were bound thereby, or when members had seceded from the church, or when they lost their membership or interest therein. It averred that those courts and judicatories had only such powers as were conferred upon them by the constitution of the church.

The answer admitted that no member of the church or any local congregation thereof had

any interest in its property, except as an incident to his membership in the organization. It denied that the Presbyterian Church had any fixed interest in or to the properties, or any of them, described in the original bill or its amendments, for all or any of the reasons stated in the original bill or for any reason whatever.

It denied that the Presbyterian Church had any right to give such directions as it deemed proper, as to the particular use which from time to time, should be made of the property, or that the reversionary right or interest, upon dissolution or disruption of the local congregation, was absolute in the church itself at large, or that it took the property with the absolute right of disposal thereof.

(6) It called for proof as to the accuracy of the statements made in Paragraph 6 of the original bill and its subdivisions, with reference to the powers, rights, duties, jurisdiction, and composition of the association, the Presbytery, the Synod or the General Assembly of the Presbyterian Church. It denied that any rights, stated in said paragraph 6 to exist in either of said bodies, even if they did exist in them, were vested in them by virtue of any contract made by the members or by any contract of membership, or that any member of the church agreed that any of the questions mentioned in subdivision (d) of said paragraph 6, should be determined or decided by the tribunal or in the manner stated in said subdivision (d).

(7) The answer admitted that the Cumberland Presbyterian Church had, at all time from its organization in the year 1810, and still had an organization similar to that of the Presbyterian Church in the United States of America; but it denied that the members of the Cumberland Presbyterian Church ever made any such contract as that alleged in paragraph 6 of the original bill, or that the allegations of that paragraph were, in fact, applicable to the Cumberland Presbyterian Church or the members thereof. It admitted that at the time of the alleged merger, the Cumberland Presbyterian Church was made up of various local congregations, worshipping in buildings and using property in different places in the State of Missouri, which buildings and property belonged to the particular congregations worshipping in and using the same respectively.

It denied that any or all of this property was acquired by the Cumberland Presbyterian Church at large, or held in trust for it, or that it was not to be used by those professing a particular creed or doctrine in existence at the time of its acquisition; or that such property was to be used by and for the denomination whose doctrine and creed should be such as might be from time to time determined by the judicatories of such church; or that the property was acquired and held so that if and when the Cumberland Presbyterian Church might be amalgamated and merged with another church, the trust should pass to and become binding upon the merged

body; or that each member of the constituent churches, so merged, had, by virtue of his membership in the merged church, a direct and beneficial interest in the property, or that the property thereby became subject to the use of the united churches.

The answer averred that on the contrary the property held and used by the respective local congregations of the Cumberland Presbyterian Church belonged to those respective local congregations, and that the church at large and the other local congregations of the church, and the church courts and judicatories had no interest therein except and unless expressly provided in the deed to the particular property. It also averred that neither the church at large nor the Presbytery nor the Synod nor the General Assmbly had any right of control of any porperty of a particular local congregation otherwise than as prescribed in the deed of conveyance of the property.

(8) The answer denied that the Presbyterian and Cumberland Presbyterian Churches, as then existing throughout the United States, had substantially the same doctrine or creed; it denied that the members of each or either of those churches had any contract as between themselves, or that in accordance with the provisions of such alleged contracts, or the provisions of the constitution, rules and regulations of either body, the two bodies entered into a contract, as stated in paragraph 8 of the original

bill. It denied that any of the respective Presbyteries or General Assemblies, or either of said bodies, were authoritzed to act or bind all or any of the members of the said bodies by any such contract as stated in said paragraph 8. It denied that the terms of the alleged contract were as stated in subdivision (a), (b) and (c) of said paragraph 8, or that any contract of any nature whatever was entered into by and between the said two bodies of churches, or by and between the respective Presbyteries and General Assemblies of the two bodies of churches, or by said Presbyteries or General Assemblies.

(9) It denied that such steps as were necessary were afterwards taken to complete said alleged merger; or that any merger was in fact carried out or completed; or that, by any steps that were taken or by anything that was done, what had been two voluntary church organizations were made one; or that either of the separate church organizations, before said alleged merger, by their respective judicatories or by any other means decided that the creed and doctrines of the two churches theretofore existing were those of the alleged new and amalgamated church; it denied that there became any new or amalgamated church. It averred that there was no amalgamation; but, on the contrary, that the existence of the Cumberland Presbyterian Church had continued and still continued in its integrity, as it had always existed, and as an entirely distinct and separate church organization.

The answer admitted that a large number of the members of the Cumberland Presbyterian Church had refused and still refused to abide by or enter into such alleged new organization; it denied that such refusing members or any of them were seceders from the alleged new, united church; it denied that there was any united church; and admitted that such refusing members were not entitled to the benefits of church membership in said alleged united church, and that said refusing members did not desire any membership in said alleged united church. The answer averred that the refusing members had simply stayed where they were in the Cumberland Presbyterian Church.

(10) The answer admitted that at the time of the alleged merger there were local congregations and church properties of the Cumberland Presbyterian Church at the places mentioned in subdivision (b) of paragraph 10 of the original bill and the amendments thereto; that at those places many members of the Cumberland Presbyterian Church and communicants of the local congregations had refused and still refused to recognize the alleged merger as legal, but declared the same to be invalid.

The answer denied that such members refused to abide by any legal or valid ruling of the church judicatories of the Cumberland Presbyterian Church, or that such members refused to accept the creed and doctrine set forth in any contract adopted by said churches.

The answer denied the existence of any contract, or that any contract was adopted by said churches, or either of them, or that any creed or doctrine was set forth in such alleged contract; or that the members of the Cumberland Presbyterian Church or any of them seceded from the churches to which they had belonged and still belonged; or that the church judicatories, or any of them, of the Cumberland Presbyterian Church had treated such members as seceders from the church, and decided them to be such, or that they had no longer a membership in such church.

The answer denied that such members of the Cumberland Presbyterian Church had conspired or confederated together for any purpose. It admitted that such members were keeping up, as it was asserted they had a right to do, as legal, the separate organization of the Cumberland Presbyterian Church, which the answer averred had never ceased to exist. It admitted that such members of the Cumberland Presbyterian Church were attempting, as it was asserted they had a right to do, to control and use in their several localities, for the use of their several local congregations, the property owned by said local congregations, or held for their use and benefits. It denied that such members of the Cumberland Presbyterian Church had seized or attempted to seize any of said property except by legal and lawful methods; it admitted that such members of the Cumberland Presbyterian Church, in their several congregations

and localities, in respect of church property in such localities, of which they were and always had been in possession, did exclude from the use thereof all persons who at one time were members of such church, who had so far recognized the alleged merger and treated the same as valid as to enter and become members of the Presbyterian Church in the United States of America, and who claimed the right to use such property as members of said Presbyterian Church; but that any exclusion extended no further than that. It averred that such members of the Cumberland Presbyterian Church had a right to exclude from church property of which they were in possession, persons who asserted that they belonged to the Presbyterian Church and wished to use such property of the Cumberland Presbyterian Church for the purposes of the Presbyterian Church. It denied that such members of the Cumberland Presbyterian Church had seized any church property of which they were not, in their several localities and congregations, already in possession, and averred that as to such properties they had merely continued to maintain their possession by remaining in and using them as members of the Cumberland Presbyterian Church. It denied that such members of the Cumberland Presbyterian Church had threatened to institute suit as to each specific property to recover the same. It admitted that a few suits had been brought in the State of Missouri by those members or representatives of the Cumberland Presbyterian Church entitled thereto, to recover church properties be-

longing to the local congregations of the Cumberland Church which were in the actual possession of members of the Presbyterian Church, who were excluding the members of the Cumberland Church (who had the right) from the use of the same. It denied that such members of the Cumberland Presbyterian Church were threatening to interfere with, molest, or prevent complainants or any other persons from using the church properties, houses of worship, parsonages, and church funds, except as thereinafter in the answer state.

The answer denied any conspiracy whatever, or that the defendants or any of them were among those who had so conducted or were conducting themselves as stated in paragraph 10 of the original bill.

The answer then legally described the various properties intended to be referred to in the bill, but as the same description is contained in paragraph 20 of the answer, which was a renewal of the plea, as hereinbefore stated, the remainder of paragraph 10, to avoid repetition, is omitted from the record.

(11) The answer denied all conspiracy or that any of the property mentioned in the bill or its amendments belonged to or was subject to the uses of the Presbyterian Church in the United States of America; it denied all threats, annoyances or disturbances on the part of the defendants; it denied that the complainants had any

right or interest whatever in any of the properties referred to in the bill or its amendments.

(12) It denied that the complainants were entitled to an account in respect of any of the property, real or personal, mentioned, or that any of it should be impressed with a trust in favor of the Presbyterian Church; and averred that the Presbyterian Church had no interest, legal or equitable, in any part of it. It insisted that no trust should be declared in reference to any part of it in favor of the Presbyterian Church but averred that, on the contrary, the beneficial interest in all of the property resided in the local congregations of the Cumberland Presbyterian Church and the members of the Cumberland Presbyterian Church in their different localities, in the same manner and to the same extent as it resided when the properties were acquired.

(13) The answer denied that the complainants, or either of them, or any of the persons whom they might claim to represent, had any equitable or beneficial interest, whatever, in any of the real estate described in the bill or its amendments; or that they or either of them or those whom they professed to represent, were entitled to have any alleged equitable or beneficial interest quieted as against the defendants, or any of them.

(14) The answer denied that the defendants made any claim in manner and form as stated

in subdivision (a) of paragraph 13 of the original bill. It averred that the defendants did claim, and that it was a fact that the Supreme Court of Missouri, in *Boyles et al. v. Roberts et al.*, referred to in paragraph 13 of the bill of complaint, did decide and determine that the alleged merger and union of the two churches was invalid, and that the same had never been legally consummated; it averred that the defendants claimed that the Supreme Court of the State, in the case referred to, decided and determined that it might inquire into the question whether the tribunals of the churches acted within the powers conferred upon them; and whether such action was in accordance with the constitution and laws of the church; it averred that the defendants also claimed that the Supreme Court, in said cause, decided that it might and would inquire into the character of the creed and doctrine of the two churches, and determine whether they were or were not the same, or vitally different; that the defendants claimed and averred that the proceedings relied upon to support the claim of the alleged merger and union were void and of no effect; and that upon such determination by the Supreme Court of the State of Missouri, it became the duty of the officers and members of the Cumberland Presbyterian Church, as well as the members of the Presbyterian Church, to abide by the same, so far, at least as to recognize the fact—and it was averred to be a fact—and no longer dispute or contend to the contrary, that the title, both legal, beneficial and equitable, to all property

both real and personal, in the State of Missouri, belonging, before said alleged union, to the Cumberland Presbyterian Church, or any of the associations, organizations or agencies controlled by it, or which it was beneficially interested, remained and continued vested in such church, its said organizations, associations and agencies, precisely the same as before. And the answer stated that the defendants did claim and aver that all such persons, members of the Cumberland Presbyterian Church, who did not so acquiesce and determine to abide by the judgment of the Supreme Court of the State, and who did recognize as valid, said merger and union, and became and were members of the Presbyterian Church, did, by such action, relinquish and surrender all their right, title and interest in any property in the State of Missouri, held or owned, legally or beneficially, by the Cumberland Presbyterian Church, its organizations, associations or agencies, and that they no longer had any interest, of any nature whatever, in any of the said property.

(15) The answer further stated that in reference to the averments of subdivision (b) of paragraph 13 of the original bill, the defendants did not admit that they made a claim in manner and form as stated in said paragraph; it averred that they did admit that the creed and doctrine of the Presbyterian Church in the United States of America, at the time of said alleged merger and union, was not then nor at the time of the filing of the answer, the doctrine

and creed of the Cumberland Presbyterian Church; that they claimed that there were vital differences between the creeds and doctrines of the two churches.

The answer denied that the complainants and the persons whom they claimed to represent had the right and privilege of membership in any church of their choosing, or that they enjoyed such right under the Fourteenth Article of Amendment to the Constitution of the United States; it denied that the complainants or either of them, or the persons whom they claimed to represent, were entitled to invoke the protection of said amendment to the Constitution of the United States for any reason whatever, or that any right whatever was denied to them, in any manner, by the defendants or by the law of the State of Missouri, or by the decision of the Supreme Court of the State in the case of *Boyles et al.* v. *Roberts et al.*

Paragraphs 16, 17, 18 and 19 of the answer do not appear in the printed record, because they are the same as paragraphs 11, 12, 13 and 14 of the answer in the College Case, which are found in the printed record beginning on page 519 thereof and ending on page 539.

No attempt will be made at this point to state, in detail, the averments of this part of the answer. They will be referred to at length in the brief and to repeat them fully here would make this statement unduly prolix. It is sufficient, it

seems to us, to state here that this part of the answer set out with particularity the events and the proceedings which finally resulted in the alleged merger of the two churches, and stated why, from the point of view of the defendants, the same was illegal and void:

First: In certain respects, the vital doctrines of the creeds of the two churches are different and in direct conflict with each other, and for this reason there was no constitutional authority in any body or bodies of the Cumberland Presbyterian Church to form a union or merger with the Presbyterian Church, which should be binding upon the members of the Cumberland Church.

Second: Even if the creeds of the two churches had been substantially the same, there existed no authority in the General Assembly of the Cumberland Presbyterian Church to enter into any contract of union with the Presbyterian Church, which should submerge the identity of the Cumberland Church and terminate its existence; and any such contract would not be binding upon the membership of the Cumberland Church.

Third: Only a part of the proposed plan of union was submitted to the presbyteries of the Cumberland Presbyterian Church. A vital and essential part of it was never submitted to them at all.

Fourth: The proposition for the union was

not fairly submitted to a vote of the general assembly of the Cumberland Presbyterian Church.

(20) Paragraph 20 of the answer (Rec., pp. 556-627) was a restatement, by leave of court (Rec., p. 711), of the matters contained in the plea which had been overruled by the court.

It averred that certain persons named in the paragraph were necessary and indispensable parties to the bill of complaint and that the court could not and should not proceed to a determination of the controversy involved unless they were made parties thereto. That all of them were citizens and residents of the State of Missouri and some of them inhabitants of and residing in the Western Division of the Western Judicial District thereof; that all of said persons were, prior to the alleged merger and union, members of the Cumberland Presbyterian Church, and some of them were trustees, or elders or deacons of said church; that all of them, since the alleged merger and union, asserted and claimed the same to be valid and binding upon all who were, prior thereto, members of the Cumberland Church; that such persons asserted that there was no longer any Cumberland Church; but that they had, since said alleged merger and union, been, and were at the time of the filing of the answer, members, and some of them elders, deacons or other officers of the Presbyterian Church.

The answer averred that the dispute involved

in the litigation, as respected each of the several properties referred to in the bill and its amendments, was, in truth and in fact, a dispute between two classes of persons, residing in the respective localities of the properties; one class asserting the validity of said alleged merger and union, and claiming for themselves, as such, as a consequence thereof, the title, either legal, equitable of beneficial, and the exclusive right to the possession, occupation, use and control of said property; the other class denying the validity and claiming for themselves, as such, the title, legal, equitable and beneficial, and the exclusive right to such possession, occupation, use and control.

The answer averred that the object of the suit was to obtain a decree, whose effect would be to adjudge and confirm such title and right in that class which asserted the validity of the merger; that the actual controversy was between those two classes; that the real parties opposed to each other in the controversy were said two classes; that all of the persons composing said two classes were citizens of the State of Missouri.

That the persons, averred by the answer to be necessary and indispensable parties to the suit, were respectively, as regarded the several local congregations, church properties and places mentioned in the bill and amendments thereto, as truly representative of the class of persons who asserted the validity of the alleged merger, as these defendants were alleged by the

bill to be of the class of persons who disputed and denied the validity thereof.

The answer further averred that no person had been made a party to the suit as representative of any one of the class of persons in the State of Missouri who asserted the validity of said alleged merger, who were members of the Presbyterian Church in the State of Missouri, and as such immediately, directly and locally interested in the several properties mentioned in the bill, as had the defendants, by the bill, been made parties representative of the class of persons in the State of Missouri who denied and disputed the validity of the merger, and were members of the Cumberland Church in the State of Missouri, and as such immediately, directly and locally interested in the several properties mentioned.

The answer then proceeded to give the names of the persons whom, it was claimed, were such necessary and indispensable parties. (Rec., pp. 557-8.)

The bill of complaint and its amendments selected one or more of the defendants, naming them, and stated that the defendants so selected denied the validity of the alleged union, and, with others in a certain locality constituted a class, whom it was said they represented, who claimed that, notwithstanding said alleged union, they, as the continuing and persisting members of the Cumberland Church, were en-

titled to the use of the property in such locality which had been acquired for the use of the local congregation of the Cumberland Church in that locality. The persons so selected were citizens of the State of Missouri.

The answer then asserted that one or two other persons, naming them, were indispensable parties to the suit. It averred that the persons so named had been officers or members of the Cumberland Presbyterian Church and of the local congregation thereof in that locality; that they asserted the validity of the union, and that they and others of that local congregation, who were of the same mind, were entitled to the use of the property which had been acquired for purpose of worship by the congregation of the Cumberland Church in that locality.

This part of the answer, in substance, stated that the membership of the Old Cumberland Church in each locality was divided in opinion, and into two classes, and that the controversy in relation to the title, beneficial interest, or use of the church property in that locality, was a controversy between those two classes; that the persons named in the answer as indispensable parties to the controversy were as truly representatives of the class in that locality asserting the validity of the union, as were the persons who had been named as defendants by the bill, representatives of the opposing class in that locality.

And so the answer dealt with each piece of

property referred to in the bill and involved in the controversy, naming in respect of it a person or persons who ought to be made a party or parties, in order that the class opposed to the class represented by the defendants, should also be represented in the suit.

This part of the answer also, in most cases, gave the names of the grantees in the deeds which conveyed the properties for church uses, and the language of the conveyances, stating the purposes for which the grants were made.

(21) The answer averred that after the alleged merger, certain persons who had been members of the Cumberland Presbyterian Church in Warrensburg, Missouri, and who acknowledged the validity of the union, joined with certain persons who had been members of the Presbyterian Church in said Warrensburg, and brought suit in the Circuit Court of Johnson County, Missouri, in their own behalf and in behalf of the members of the Presbyterian Church in the United States of America, and especially in behalf of those members of said church who had formerly belonged to the Cumberland Presbyterian Church and who adhered to said Presbyterian Church in Warrensburg, against other persons, members of the Cumberland Presbyterian Church in Warrensburg, who denied the validity of the union, making them defendants as in their personal capacity and also as representative of certain other persons, not named, members of the Cumberland Pres-

byterian Church in Warrensburg who had also denied the validity of the union.

The defendants in that suit and those whom it was said they represented were in possession of the Cumberland Church property in Warrensburg. It was charged that they refused to permit the plaintiffs in said suit, or those whom they represented, to use the property. The bill or petition in that case set out the proceedings in the various bodies of the two churches through which it was claimed a union of them had resulted; asserted that the Cumberland Presbyterian Church had ceased to exist, and that the church property in Warrensburg, which had once been devoted to the use of the Cumberland Presbyterian Church, had, by operation of law, become devoted, since said alleged union, to the use of said Presbyterian Church in the United States of America. The bill or petition further stated that the defendants therein and those whom they represented disputed the fact that any union had been consummated and that they claimed that the Cumberland Presbyterian Church still existed, and that the church property in Warrensburg was still, as before, devoted to the uses of said Cumberland Presbyterian Church.

The answer further averred that the controlling question in said case was whether the alleged union of the two churches had, in fact, been accomplished, and was legal, valid and effectual; the plaintiffs therein asserting the

same, and the defendants disputing it; and that the controlling question in that case was the same as the controlling question in this suit.

The relief sought was a decree declaring the union between the churches to be valid; that all of the property rights possessed by the Cumberland Presbyterian Church or any of its judicatories or congregations passed, by operation of law, to the united church; that all ministers, officers and members, belonging to what was the Cumberland Church and then adhering to the Presbyterian Church, constituted the true and lawful members of the various congregations, and that all who had renounced or should renounce the said Union Church, had ceased to be members of the congregations; and that all elders and deacons renouncing the United Church had ceased to be elders and deacons in the congregations, and had ceased to have any right to control or hold possession of any property belonging or appertaining to their respective congregations; that all pastors of churches so renouncing the Union Church, had vacated their respective pastorates and forfeited all their rights of property and all other rights and privileges as members, officers or ministers; and for a decree that the elders loyal to the United Church at Warrensburg, Missouri, be placed in immediate possession of the church property in that place, and their rights declared and protected; and that all ministers, officers and members of the Cumberland Presbyterian Church at Warrensburg, who repudi-

ated the action of the General Assembly and denied the validity of the union, and all their associates, confederates, agents and representatives be enjoined from interfering with the postors or others who recognized the union, in the use, enjoyment and possession and exclusive control of all houses of worship, parsonages and endowment funds, or other property or effects which belonged to the Cumberland Presbyterian Church or any of its boards, committees judicatories, congregations or institutions, or held in trust for them; and that they be enjoined from using the name of the Cumberland Presbyterian Church as the name or any part of the name of any of their organizations or congregations.

The answer further averred that the Circuit Court rendered a decree in accordance with the prayer of the petition, whereupon the defendants prosecuted an appeal to the Supreme Court of the State, which, on the 8th day of June, 1909, reversed the judgment and decree of the Circuit Court, and remanded the case to the Circuit Court with directions to dismiss the plaintiff's petition and enter judgment in favor of the defendants therein.

That at the same time, as was required by law, the Supreme Court filed its opinion, in writing, in said case, by which it was declared and determined that said attempted union and the proceedings by virtue of which it was claimed, were null, void and of no effect, and that the property of the Cumberland Presbyter-

ian Church and property held in trust for its use or its benefit or the promotion of its doctrines, was still held for the same purposes and for the benefit of those members of the Cumberland Presbyterian Church who had refused to acquiesce in said scheme of union; and that therefore, neither the Presbyterian Church in the United States of America nor any of its judicatories, general assemblies, synods, presbyteries, boards and congregations or members of said church, had, by virtue of said pretended union, any interest whatever in any such property.

A motion for a rehearing of said cause was denied by said Supreme Court, October 22, 1909.

A copy of the opinion of the Supreme Court was filed with the answer and made a part of it.

(22) The answer averred (Rec., pp. 631-2) that in respect of certain church property in Henry County, Mo., mentioned in the bill and known as the Mount Carmel Church, the controversy had been settled by a judgment of the Circuit Court of Henry County, rendered on November 5, 1909, in a suit between opposing parties in the congregation of said Mount Carmel Church, one asserting and the other denying the validity of the union, in which the question of such validity was the vital one and the one upon which the judgment turned. The decree of that court declared the property to be

held in trust for the use and benefit of the members of the congregation of that church who were loyal to the faith and organization of the Cumberland Presbyterian Church—that is to say those who disputed and denied the validity of said alleged union and still claimed to be members of the congregation of the Mount Carmel Cumberland Presbyterian Church, as they always had been, and that said judgment and decree remained unappealed from and that after the rendition of the same the persons who were parties to that suit, representatives of the Presbyterian Church in the United States of America, who had been in possession of the property therein involved, surrendered it to their said opponents, in accordance with the decree of said court, and that the same had ever since that time been in the possession of certain persons named as trustees, elders and representatives of the Mount Carmel Cumberland Presbyterian Church.

These preceedings were pleaded as *res judicata* and in bar of the action, so far as the same pertained or related to said property.

(23) The answer further averred that after the decision and judgment of the Supreme Court of Missouri, already referred to, and long before the filing of the bill in this case, the defendants, Hayes and Sharp, and others, officers and members of the Cumberland Presbyterian Church at Marshall, Saline County, Missouri, brought their action in the Circuit Court of Sa-

line County against David F. Manning and L. M. Morrow, (who were asserted by the answer to be indispensable parties to this action), and other persons, officers and members of the Presbyterian Church at Marshall, the purpose of which was to have determined and declared in the plaintiffs therein and those whom they represented, the title, legal equitable and beneficial, to the properties mentioned in the bill of complaint, and situated in said city of Marshall, and to recover from the defendants in said action possession of said property; and it averred that in said action the principal and fundamental issue was whether said alleged merger and union was valid or invalid; that said action was still pending, and it was asserted that until said suit in Saline County was finally determined, this cause ought not to proceed as to said property so situated in said city of Marshall.

The answer further averred that the complainants and those for whom they sued had no interest in any of the property mentioned in the bill of complaint or its amendments, unless and except by virtue of said alleged union and merger, which had, by the Supreme Court of Missouri, been adjudged invalid, null and void; and that complainants had brought said bill for the obvious purpose of defeating the result of that decision and nullifying the same; that complainants had, by said suit, invoked the jurisdiction of the court in order to reopen a controversy settled by the Supreme Court of the State, within whose territorial jurisdiction the prop-

erty involved was situated; that they had intentionally and improperly omitted to make as parties to said suit the persons whom the answer averred were indispensable parties thereto, because if they had been made parties, as they should have been, the case would not have presented a controversy between citizens of different States; but the controversy would have been one between the persons whom they had so omitted to make parties, citizens of Missouri, on the one side, and the answering defendants, also citizens of Missouri, on the other side.

The answer averred that the complainants ought not to be permitted to improperly make, join and omit parties, for the purpose of presenting a supposed and unreal controversy between citizens of different States, and to create thereby a cause cognizable in this court, when, in fact, as shown, in said answer, the real controversy was between citizens of the same State.

The complainants filed the general replication (Rec., p. 686).

The cause was heard and the decree entered December 15, 1913 (Rec., p. 672).

THE EVIDENCE.

By stipulation (Rec., pp. 34-7), it was agreed:

1. The description of the property involved is as alleged in the bill and answer.

2. The property involved was originally conveyed as alleged in the pleadings.

3. Certain defendants (naming them) were ministers of the Cumberland Presbyterian Church on May 25, 1906, and denied the validity of the union, and belonged to and are proper representatives of organizations claimed by them to be the presbyteries and synods of Missouri of the Cumberland Presbyterian Church; and they are citizens of Missouri.

4. The other defendants and those whom they represent were members, and some of them officers of the local congregations of the Cumberland Presbyterian Church, using the respective properties, on May 25, 1906, and some of them were trustees, under the deeds referred to in the bill and answer, who denied the validity of the union and now compose the local congregations which they claim to be the original Cumberland Presbyterian Church, and as such claim the title to the beneficial use of the respective properties in controversy, and that they are citizens of Missouri.

5. Certain persons (naming them) were, on May 25, 1906, and still are, trustees in possession of certain trust funds and properties referrred to in the bill and answer; those funds and properties were, on May 25, 1906, held for the respective bodies of the Cumberland Presbyterian Church, as alleged in the pleadings. None of the parties so mentioned as being in possession of said trust funds and properties are parties to the action, and all of them are alleged in the answer to be indispensable parties,

and they are all residents of Missouri. Certain of the defendants (naming them) are proper representative defendants, claiming the beneficial use of the funds for their respective organization, who denying the validity of the union, are now members of organizations of the Cumberland Presbyterian Church, which they claim are identical with the organizations which were, at the time of the alleged union, beneficiaries of said trust funds and properties.

6. The persons named in the answer not made parties to the suit, and asserted by the answer to be indispensable parties, do, in fact, sustain the relations to the respective properties, churches, congregations and the controversy as to the validity of the union, as stated in the answer, and are representatives in their respective congregations of the class of persons who, on May 25, 1906, were members of the same local congregations of the Cumberland Presbyterian Church, and accepted and asserted the validity of the union and now belong to the united church, and are all residents of Missouri.

7. The possession of the respective properties is in the parties as stated in the pleadings.

8. The complainant, Barkley, is a resident and citizen of the State of Michigan, and the complainant, Roberts, is a resident and citizen of the State of Pennsylvania.

The Cumberland Church exists as a separate and distinct unincorporated or voluntary as-

sociation from the Presbyterian Church, and has existed as such, since the year 1810, the date of its founding. Its standards consist of its "Confession of Faith," "Catechism," "Constitution," "Rules of Order," "General Regulations," "Directory of Worship," and "Rules of Discipline," all existing in written and printed forms, setting forth the purposes of the organization, its doctrines, creeds, forms of worship, system and agencies of government, the jurisdiction and practice of each agency or court. The object of its organization is the enjoyment and promulgation of certain doctrines, creeds and forms of worship, distinct from that of any other organization, and consonant with the religious beliefs and instincts of its founders and adherents, as set forth in its standards, and its system and agencies of government is sought, not only to secure such result but also the security and permanence of the organization, and the protection of its adherents in the enjoyment thereof, and in the use and enjoyment of the properties acquired and held in trust therefor, and for the protection of the adherents of any sub-division thereof, in the use and enjoyment of the property acquired and held in trust by such sub-division. (Record, pp. 253-266.)

The Cumberland Church at large, is a system or association of particular churches or local congregations, professing the same doctrines and beliefs, and separate and distinct from any and all other societies. Its administrative, legislative and judical agencies are termed

"courts," and are in regular gradation as follows: "Church Sessions," "Presbyteries," "Synods," and "General Assembly." (Record, p. 258.)

At the inception of the scheme out of which this controversy rose, it had a total membership of about 185,000, comprising 2,869 congregations, 114 presbyteries, and 17 synods. It had 1,514 ordained ministers, 9,614 elders, and 3,914 deacons. About 40 per cent of its entire membership was found in the two States of Tennessee and Missouri, while the remainder were scattered principally throughout the States of Kentucky, Illinois, Indiana, Ohio, Pennsylvania, Iowa, Colorado, California, Oregon, Texas, Arkansas, Alabama, and Mississippi. (Record, pp. 276-277.)

Its founders had formerly been members of the Presbyterian Church, but had been silenced or ex-communicated by that body by reason of the renunciation by them of certain of the particular doctrines and creeds of that church embraced within the Westminster Confession, or rather by reason of their refusal to accept the same, and the very foundation and organization of the Cumberland Church is based upon the protest against, the hostility to, the dissent from, and the rejection of the Presbyterian Confession of Faith, commonly termed the "Westminster Confession," by its founders and adherents. (Record, p. 253.)

"BRIEF STATEMENT" OF DOCTRINES OF CUMBERLAND PRESBYTERIAN CHURCH, PROMULGATED IN 1813.

The first doctrinal statement of the Cumberland Church was known as the "Brief Statement," and was issued in the year of 1813 by the then highest court of the church, the Synod, and set forth the points of difference between it and the Westminster or Presbyterian confession, and the matters in said confession to which they dissented.

These points were as follows:

1st. That there are no eternal reprobates.

2nd. That Christ died, not for a part only but for all mankind.

3rd. That all infants dying in infancy are saved through Christ and the sanctification of the Spirit.

4th. That the Sprit of God operates on the world, or as coextensively as Christ has made atonement, in such manner as to leave all men inexcusable. (Record, p. 253.)

In 1814 the Westminster Confession of Faith, revised by the elimination of certain of the objectionable features and made to conform as near as possible with the views of the Cumberlands as set out in the "Brief Statement," was adopted as the Cumberland Confession of Faith.

In 1829 changes were made in the form of government, and a General Assembly provided

for. The revision of 1814, while it had accomplished the purpose of expunging many of the boldly defined statements of doctrine objected to by the Cumberlands, did not express so fully and clearly the position of the Cumberlands as was desirable, for the reason that it had been impossible to eliminate all the features of hyper-Calvinism from the Westminster Confession, by simply expunging words or sentences and inserting corrected statements. Nevertheless it stood as the Confession of Faith of the Cumberlands until the year 1883, at which date it was amended and restated, in accordance with the provisions of its Constitution then in force, with the view of further eliminating such objectionable features of hyper-Calvinism, and its logical sequences as remained, and so as to more fully meet the views of the Cumberlands, and to more clearly and logically set forth the system of theology as believed and taught by them, and in such revised form without amendment or change, the same exists to this date. (Record, pp. 254-255.)

At the same time with the revision of the Confession of Faith and in the same manner, the Constitution of the church was amended and restated in certain important particulars, the changes made in the Constitution, in the language of the committee having the same in charge, being "such as were found necessary to present more clearly the practice and usage of the church courts, and such as were deemed proper to develop more certainly" the work and

resources of the church. (Record, pp. 55, 254-255.)

The authority of the General Assembly was restated with particularity, and the chief amendments made related directly to the jurisdiction of that court and of the other church courts, and their practices with reference to proposed unions of the church with other bodies. (Record, p. 55.)

From 1829 to the amendment of 1883 the powers of the General Assembly of the Cumberland Church, as enumerated in its Constitution, were as follows:

> "Sec. IV. The General Assembly shall admit and judge of the appeals regularly brought before them from the inferior judicatories; give their judgment on all references of ecclesiastical cases made to them; review the synodical books, redress whatever has been done by the synods contrary to order, take effectual care that synods observe the Constitution of the church, make such regulations for the benefit of the whole body and of the synods, presbyteries and churches under their care, as shall be agreeable to the word of God and the Constitution of the church.
>
> "Sec. V. To the Assembly also belongs the power of consulting, reasoning and judging in all controversies respecting doctrine and discipline; of reprieving, warning or bearing testimony against error in doctrine or im-

mortality in practice in any church, presbytery or synod; of corresponding with other churches; of putting a stop to schismatical contentions and disputations; and in general of recommending and attempting reformation of manners, and of promoting charity, truth and holiness through all the churches, and of altering, dissolving and creating new synods, when they judge it necessary." (Record, p. 665.)

Among other amendments to the powers of the General Assembly, as set forth in the above quoted sections, there was added in 1883 the following:

"To receive under its jurisdiction other ecclesiatical bodies whose organization is conformed to the doctrine and order of this church; and to authorize synods and presbyteries to exercise similar powers in receiving bodies suited to become constitutents of those courts, and lying within the geographical bounds respectively." (Record, page 321.)

At the same time and in the same manner another clause, making it clear that neither the General Assembly or any other court of the church had any powers whatever, except such as were expressly granted them by the terms of the Constitution, was introduced as an amendment to Section 25 of the Constitution, the same being as follows:

"And the jurisdiction of these courts is

limited by the express provisions of the Constitution." (Record, p. 318.)

Prior to 1883 no express reference was found to any power in the General Assembly of the church to make or form a union, or to entertain any proposition of any kind, for union, with any other denomination. (Record, p. 665.)

During the interval between 1810 and 1871 there were occasional expressions of regret in the different church bodies that any differences had arisen, necessitating the separation from the Presbyterian Church, and expressing a desire and hope that the two bodies might again unite, provided it could be done without the surrender of convictions upon the part of the Cumberlands. The last of this, however, was heard in 1871. At that time, 1871, the Cumberland Assembly, at the request of the Presbyterian Assembly, appointed a committee to confer with a like committee upon the part of the Presbyterian Church, to ascertain if a feasible proposition might be worked out between them, but the differences between doctrine and statement were found to be so vital and of such an unyielding character, that further consideration of the matter was precluded, and the committee was discharged without having submitted any proposition or plan. (Record, pp. 46-51.)

This gave rise to the movement in the church for a more thorough statement of the Cumberland position, and for the elimination from its

Confession of Faith of all those features that might in any way be suggestive of an acceptance of hyper-Calvanistic doctrines, and which led to the revised and amended Confession of Faith of 1883, and the Constitutional amendments adopted at the same time, by which the permanence of the church was sought to be more securely established and developed. Certain its was, that by the revision of 1883, it was sought to emphasize the position of the church in its dissent from the fatalistic (so termed) features of the Westminster Confession, as held by the Presbyterian Church, and by the Constitutional amendments to provide against the surrender of their position by the General Assembly or other church courts, inasmuch as by said amendments it was made clear, that the General Assembly could not entertain any proposition for union with any other church, except upon the sole condition of preserving the identity of the Cumberland organization, and the reception under its jurisdiction of bodies of like faith and order with it, the very reverse of what was done in the alleged proceedings in question here. (Record, p. 321.)

Such brief statements of the respective laws of the two churches, and of the doctrines held by each, and the proceedings had in each body with reference to the alleged union or merger, as are deemed important in arriving at a determination of the questions involved herein, are now hereinafter set out:

FROM THE CONSTITUTION OF THE CUMBERLAND CHURCH.

CONGREGATIONS, ELDERS AND DEACONS.

Under the laws of the Cumberland Church, the officers of the congregation are the ministers in charge, the elders and deacons. (Record, p. 317. Sec. 4 of Const.)

Each congregation elects its elders and deacons from among its members. This is done at a congregational meeting, and any member has the right to submit a nomination. (Record, p. 262. Sec. 45 of Const.)

When organized, each congregation makes application for membership to the presbytery within the bounds of which it is located. (Sec. 3 General Reg.; Record, p. 265.)

SESSION.

The Church Session is the lowest court of the church, and is composed of the minister in charge of the particular congregation and of the elders elected by the congregation. Its powers are enumerated in Section 27 of the Constitution, and are as follows:

> "The Church Session is charged with maintaining the spiritual government of the church, for which purpose it is its duty to inquire into the doctrines and conduct of the church members under its care; to receive members into the church; to admonish, suspend and ex-communicate those found delin-

quent, subject to appeal; to urge upon parents the importance of presenting their children for baptism; to grant letters of dismission, which, when given to parents, shall always include the names of their baptized children; to ordain and sustain ruling elders and deacons, when elected, and to require these officers to devote themselves to their work; to examine the records of the proceedings of the deacons; to establish and control Sabbath schools and Bible classes, with special reference to the children of the church; to order collections for pious uses in the churches; to take the oversight of the singing in the public worship of God; to assemble the people for worship when there is no minister; to concert the best measures for promoting the spiritual interests of the church; to observe and carry out the injunctions of the higher courts; to appoint representatives to the higher courts, and to require on their return report of their diligence." (Record, p. 318.)

PRESBYTERY.

The Presbytery is next above the Session and consists of all ordained ministers and one ruling elder from each local congregation within a certain district. It is required to meet once a year, and its powers are enumerated in Section 31 of the Constitution, found at page 319 of this record, which is as follows:

"The presbytery has the power to examine and decide appeals, complaints and references

brought before it in an orderly manner; to receive, examine, dismiss and license candidates for the holy ministry; to receive, dismiss, ordain, install, remove and judge ministers; to review the records of the church sessions, redress whatever they may have done contrary to order, and take effectual care that they observe the government of the church; to establish the pastoral relation and to dissolve it at the request of one or both of the parties, or where the interests or religion imperatively demand it; to set aside evangelists to their proper work; to require ministers to devote themselves diligently to their sacred calling and to censure and otherwise discipline the delinquent; to see that the injunctions of the higher courts are obeyed; to condemn erroneous opinions which injure the peace or purity of the church; to resolve questions of doctrine and discipline, seriously proposed; to visit particular churches; to inquire into their condition, and redress the evils that may have arisen in them; to unite or divide churches, with the consent of a majority of the members thereof, and for cause to dissolve the relation between it and the particular church, which shall thereafter cease to be a constituent of the Cumberland Church, and forfeit all rights as such; to form and receive new churches; to take special oversight of vacant churches; to concert measures for the enlargement of the church within its bounds; in general to order whatever pertains to the spiritual welfare of the churches under its care; to

appoint representatives to the higher courts; and finally to propose to the Synod or General Assembly such measures as may be of common advantage to the church at large." (Record, page 319.)

SYNOD.

The Synod is next above the Presbytery, and consists of all ministers and one ruling elder from each congregation, in a district comprising at least three presbyteries. It is required to meet at least once in every two years, and its powers are enumerated in Section 37 of the Constitution, as follows:

"The Synod has power to receive and decide all appeals, complaints and references regularly brought up from the Presbyteries; to review the records of the Presbyteries and to review whatever they may have done contrary to order; to take effectual care that presbyteries observe the government of the church, and that they obey the injunctions of the higher courts; to create, divide or dissolve presbyteries, when deemed expedient; to appoint ministers to such work, proper to their office, as may fall under its own particular jurisdiction, and in general to take such order with respect to the presbyteries, church sessions and churches under its care as may be in conformity with the principles of the government of the church and for the word of God, and as may tend to promote the edification of the church, and the prosperity and

enlargement of the church within its bounds; and finally to propose to the General Assembly such measures as may be of common advantage to the whole church." (Record, page 320.)

GENERAL ASSEMBLY.

The General Assembly is the highest court of the church, and represents in one body all the particular churches thereof. It constitutes a bond of union, peace, correspondence and mutual confidence among all its churches and courts, and is required to meet at least once in every two years, at a time and place determined at a preceding meeting, and consists of commissioners from each presbytery, made up equally from ministers and elders. Its powers are enumerated in Section 43 of the Contitution, and are as follows:

"The General Assembly shall have power to receive and decide all appeals, references and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immortality in practice injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction in conformity with the government of the church in ll cases submitted to it; to review the records of the Synods; to take care that the inferior courts observe government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlarge-

ment of the church; to create, divide or dissolve synods; to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies, whose organization is conformed to the doctrine and order of this church; to authorize synods and presbyteries to exercise similar powers in receiving bodies suited to become constitutents of those courts and lying within their geographical bounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and in general to recommend measures for the promotion of charity, truth and holiness throughout all the churches under its care." (Record, p. 321.)

OBJECT OF CHURCH COURTS.

Sec. 24 Const.:

"It is necessary that the government of the church be exercised under some certain and definite form, and by various courts in regular gradation. These courts are denominated church-sessions, presbyteries, synods and General Assembly." (Record, p. 318.)

LIMITATIONS OF POWER OF CHURCH COURTS.

Sec. 25 of Const.:

"The church session exercises jurisdiction over a single church; the presbytery, over

that which is common to the ministers, church sessions and the churches within a prescribed district; the synod over what belongs in common to three or more presbyteries and their ministers, church sessions and churches; and the General Assembly over such matters as concern the whole church; and the jurisdiction of these courts is limited by the express provisions of the Constitution. Every court has the right to receive questions of doctrine and discipline seriously and reasonably proposed, and in general to maintain truth and righteousness, condemning erroneous opinions and practices which tend to the injury of the peace, purity or progress of the church; and although each court exercises exclusive original jurisdiction over all matters specially belonging to it, the lower courts are subject to the review and the control of the higher courts in regular gradation. (Record, p. 318.)

AMENDMENTS.

Sec. 60 of Const.:

"Upon recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof, voting thereon, the Confession of Faith, Catechism, Constitution and Rules of Discipline may be amended or changed when a majority of the presbyteries for that action shall approve thereof. The other parts of the government, that is to say, the General Regulations, the Directory for Worship and the Rules of Order, may

be amended or changed at any meeting of the General Assembly by a vote of two-thirds of the entire number of commissioners enrolled at the meeting; provided, that such amendment or change shall not conflict in letter or spirit with the Confession of Faith, Catechism or Constitution of the church." (Record, p. 321.)

COMMISSIONERS TE THE GENERAL ASSEMBLY.

Sec. II, General Regulations, requires that commissions in writing be given each Commissioner to the General Assembly, reciting his authority as such commissioner in said Assembly in accordance with the form in said section prescribed, to be "to consult, vote and determine on all things that might come before the same, according to the principles of the government of the Cumberland Church and the word of God; and of their diligence therein, they are required to render an account upon their return." Record, p. 323.)

PROPERTY.

There does not appear to have been any provisions incorporated into any of the printed standards of the church touching the acquisition of property for use either by the separate congregations or for the church system as a whole, or for the control, management or disposition of any property that might be acquired by said congregations for their separate use, or by the association of churches as a whole, or by any of the boards or agencies of the church, but

such matters seem to have been ignored entirely as foreign to the jurisdiction of the church, and left to be determined wholly by the laws of the land applicable thereto. The only reference to property is found in section 19 of the Constitution, concerning Deacons, which is as follows:

> "The duties of this office specially relate to the care of the poor and to the collection and distribution of the offerings of the people for pious uses, under the direction of the church session; to the deacons also may be properly commended the management of the temporal affairs of the church, or the same may be commended to the deacons and the church session as a board, sharing equal rights and responsibilities."

PRESBYTERIAN CHURCH CONSTITUTION.

The Presbyterian Church is also an unincorporated voluntary association for religious purposes, with written and printed standards, setting forth the purposes of its organizations, its distinctive doctrines and creeds, forms and agencies of government and system of courts, consisting of sessions, presbyteries, synods and General Assembly; differing, however, in many material and important respects from the Cumberland in details of government, in the power and authority of its various courts and agencies, in matters of polity generally, and in doctrine and creed.

The powers of the General Assembly are es-

sentially different from the power and authority of the General Assembly of the Cumberland Church, and especially with relation to the question of the power to form a union of their church with another church. It has unlimited authirity to correspond with other churches and upon such terms as may be agreed upon between it and the corresponding body. Its powers are thus set out i nits written Constitution:

"IV. The General Assembly shall receive and issue all appeals, complaints and references that affect the doctrine or Constitution of the church, and are regularly brought before it from the inferior judicatories, provided that cases may be transmitted to the permanent judicial commission of the General Assembly, as provided in the Book of Discipline. The General Assembly shall review the records of every synod and approve or censure them; shall give its advice or instruction in all cases submitted to it, in conformity with the constitution of the church; and it shall constitute the bond of union, peace, correspondence and mutual confidence among all our churches. (Record, p. 243.)

V. To the General Assembly also belongs the power of deciding all controversies respctiong doctrine and discipline; of reproving, warning or bearing testimony against error in doctrine, or immortality in practice in any church, presbytery or synod; of erecting new synods, when it may be judged necessary; of superintending the concerns of the

whole church; *of corresponding with foreign churches, on such terms as may be agreed upon by the Assembly and the corresponding body;* of supressing schismatical contentions and disputations; and in general of recommending and attempting reformation of manners, and the promotion of charity, truth and holiness, through all the churches under their care." (Record, p. 243.) (The italics are ours.)

The power to form a union with another body, if it exists at all, is embraced within the italicised clause. No such clause is found in the Cumberland constitution; but upon the other hand, as already noted, the power of the Cumberland Assembly is limited to receiving under the Cumberland jurisdiction another church of like faith and order with it, and is precluded from making any other kind. (Record, p. 321.)

Neither is there found in the Presbyterian Confession or Constitution any such limitation as is found in section 25 of the Cumberland Constitution, which is as follows:

> "And the jurisdiction of these courts is limited by the express provisions of the Constitution."

DIFFERENCES IN DOCTRINE.

The creeds and doctrines of the two churches are also radically different. The same differences existed at the time of the alleged contract of union, and exist now, as existed in 1810, when

the founders of the Cumberland Church were silenced or ex-communicated, and when the Cumberland Church was founded, as shown by the respective Confession of Faith in evidence. (Record, pp. 315-317, 324-327.)

The Presbyterian Church has for its Confession of Faith what is known as the Westminster Confession, which is the same now as it was in the years of 1901, 1902, 1903, 1904, 1905 and 1906, and was the same in those years as it was in 1810, and ever since has been; while the Cumberland Confession is the exact opposite. (Record, pp. 275, 293, 650, 651, 279, 315.)

Many of the material points of difference are set out in the answer, and some of such differences will readily appear from the following few quotations from each respective Confession.

PRESBYTERIAN CONFESSION.

"Chapter 3.

Of God's Eternal Decree.

III. By the decree of God, for the manifestation of his glory, some men and angels are predestinated unto everlasting life and others foreordained to everlasting death.

IV. These men and angels, thus predestinated and foreordained, are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished.

V. Those of mankind that are predestinated

unto life, God, before the foundation of the world was laid, according to his eternal and immutable purpose, and the secret counsel and good pleasure of his will, hath chosen in Christ unto everlasting glory, out of his mere free grace and love, without any foresight of faith or good works, or perseverence in either of them, or any other thing in the creature, as conditions or causes moving him thereunto, and all to the praise of His glorious grace.

VI. As God hath appointed the elect unto glory, so hath He, by the eternal and most free purpose of His will, foreordained all the means therto. Wherefore they who are elected being fallen in Adam, are redeemed by Christ, are effectually called unto faith in Christ by His spirit working in due season, are justified, adopted, sanctified and kept by His power through faith unto salvation. Neither are there any other redeemed by Christ effectually called, justified, adopted, sanctified and saved, but the elect only.

VII. The rest of mankind, God has pleased, according to the unsearchable counsel of His will, whereby He extendeth or withholdeth mercy as He pleaseth for the glory of His sovereign power, over His creatures, to pass by, and to ordain them to dishonour and wrath for their sins, to the praise of His glorious justice." (Record, p. 324.)

EFFECTUAL CALLING.

"I. All those whom God hath predestined unto life, and those only, He is pleased, in His

appointed and accepted time, effectually to call, by His word and spirit, out of the state of sin and death, in which they are by nature, to grace and salvation by Jesu Christ, enlightening their minds spiritually and savingly, to understand the things of God; taking away their hearts of stone, and giving unto them a heart of flesh; renewing their wills and by His almighty power determining them to that which is good, effectually drawing them to Jesus Christ, yet so as they come most freely, being made willing by His grace.

III. Elect infants dying in infancy, are regenerated and saved by Christ through the Spirit, who worketh when and where and how He pleaseth. So also are all other elect persons, who are incapable of being outwardly called by the ministry of God.

IV. Others not elected, although they may be called by the ministry of the Word, and may have come to Christ, and therefore cannot be saved, much less can men, not professing the Christian religion be saved in any other way whatever, be they ever so diligent to frame their lives according to the light of nature, and the law of the religion which they do profess, and to assert and maintain that they may is very pernicious and to be detested." (Record, pp. 324-325.)

CATECHISM.

"12. What are the decrees of God?

God's decrees are the wise, free and holy acts of the counsel of His will, whereby, from

all eternity, He hath for His glory, unchangeably foreordained, whatsoever comes to pass in time, especially concerning men and angels.

13. What hath God especially decreed concerning men and angels?

God, by the eternal and immutable decree, out of His mere love, for the praise of His glorious grace, to be manifested in due time, hath elected some angels to glory; and in Christ hath chosen some men to eternal life and the means thereof; and also according to His sovereign power and the unsearchable counsel of His own will (whereby he extendeth or withholdeth favor as he pleaseth), hath passed by, and foreordained the rest to dishonor and wrath, to be for their sin inflicted, to the praise of the glory of His justice." (Record, p. 326.)

THE CUMBERLAND CONFESSION.

"DECREES OF GOD.

"8. God, for the manifestation of His glory and goodness, by the most wise and holy counsel of His own will, freely and unchangeably ordained and determined, what He Himself would do, what He would require His intelligent creatures to do, and what should be the awards respectively of the obedient and the disobedient.

9. Though all Divine decrees may not be revealed to man, yet it is certain that God hath

decreed nothing contrary to His revealed will or written word. (Record, p. 315.)

FREE WILL.

34. God, in creating man in His own likeness, endued him with intelligence, sensibility and will, which form the basis of moral character and render man capable of moral government.

35. The freedom of the will is a fact of human consciousness and is the sole ground of human accountability. Man in his state of innocence was both free and able to keep the Divine law, also to violate it. Without any constraint, from either physical or moral causes, he did violate it." (Record, p. 316.)

DIVINE INFLUENCE.

38. God, the Father, having sent forth His son, Jesus Christ, as a propitiation for the sins of the world, does most graciously vouchsafe a manifestation of the Holy Spirit with the same intent to every man. (Record, p. 316.)

REGENERATION.

54. All infants dying in infancy, and all persons who never had the faculty of reason, are regenerated and saved. (Record, p. 316.)

CATECHISM.

7. What are the decrees of God?

The decrees of God are His wise and holy purpose to do what shall be for His glory. Sin, not being for His glory, therefore, He hath not decreed it.

21. What are the evils of that estate into which mankind fell?

Mankind is consequence of the fall, has no communion with God, discerns not spiritual things, prefers sin to holiness, suffers from the fear of death and remorse of conscience, and from the apprehension of future punishment.

22. Did God leave mankind to perish in this estate?

No; God, out of His mere good pleasure and love, did provide salvation for all mankind.

23. How did God provide salvation for mankind?

By giving His son, who became a man, and so was and continued to be both God and man, in one person, to be a propitiation for the sins of the world." (Record, p. 317.)

The differences between the two confessions are apparent.

That the differences were recognized by the two churches is made plain by the Committee on Union in the Presbyterian Church, in making and presenting the joint report on union to the General Assembly of that Church in 1904, when it says in paragraph 8 thereof, at page 279 of this Record:

"The members of the Cumberland Presbyterian Committee, declared that their church held to the Reformed Faith, they had applied for admission and had been admitted as pres-

byterians to the alliance of reformed churches throughout the world holding the Presbyterian system, and that they believed they were sufficiently in accord with us to enter into negotiations for union. The language used in the first paragraph of Concurrent Declaration No. 1, declaring that such agreement obtained in the Confessions of Faith of the two churches, as to warrant the union—a union honoring alike to both—was primarily the language of that Committee. Whatever the differences between the churches have been, and there have been decided differences, these brethren must be regarded as giving expressions to their sincere convictions that such doctrinal agreement now exists between the two churches as to warrant their adopting our Confession of Faith, as interpreted by the Declaratory Statement. Your Committee likewise appreciated the power of this presentation made by the brethren of the other Committee, and while the language of declaration number one was not satisfactory to them or to us, and an effort was made to secure a different phraseology, it was felt by all that some cordial acknowledgment of a sufficient doctrinal agreement to warrant union, should union be deemed advisable, was due to a church, which it was proposed by both Committees, should yield its name, adopt our standards as an entirety, and find complete union with us."

There was no claim that the two were the

same, and no finding or adjudication by the Assemblies, or either of them, that the two were the same. The most that was said was, "that sufficient agreement obtains as to warrant the union," and that such agreement did not exist is further shown by paragraph 9 of said Committee report, and by the further provisions therein for extending a liberty of belief to the Cumberlands; that is, the privilege of accepting the Westminster Confession or not, as they pleased. (Record, p. 279.)

The Presbyterian Church stands steadfastly to the proposition that there has been no change in its adherence to the Westminster Confession, and that its creed and doctrinal position is the same that it has always been, and the Cumberland likewise claims that its position is yet the same as when it openly rejected the Westminster Confession in 1810, unless, perhaps, such position was more pronouncedly taken in 1883. (Record, pp. 315, 650, 100.)

THE DECLARATORY STATEMENT OF THE PRESBYTERIAN CHURCH OF 1902-3.

This "Declaratory Statement" is found on Record, p. 236.

The Presbyterian Church insists that by the Declaratory Statement of 1902 and 1903 no change was made in its position from what had formerly been held by it; that the statement was simply "for a better understanding of their

doctrinal beliefs," and that no change was made or intended in said doctrines, but such doctrines were still held as formerly, and their position is amply sustained by the record. (Record, pp. 275-279.)

In 1901 the General Assembly of that body, in appointing the Committee to prepare the "Declaratory Statement of 1902," gave instructions "that the said statement is to be prepared with a view to its being employed to give information and a better understanding of our doctrinal beliefs and not with a view to its becoming a substitute for or an alternative of our Confession of Faith. * * * In being understood that the revision shall in no way impair the integrity of the system of doctrine set forth in our Confession of Faith and taught in the Holy Scriptures." (Record, p. 315.) The Confession was to remain true to the Westminster Confession and did so remain. No change whatever was made in the Confession. It was not even an amendment.

No less an authority than the Committee on Union in the Presbyterian Church, in presenting the joint report of union to the General Assembly of that body in 1904, says that such amendment did not become a part of the Constitution, and could at any time be altered or rescinded by the General Assembly, and that the Cumberland body so understood. (Paragraph 8 of Committee Report, Record, p. 279.)

That the Cumberlands did so understand it

is apparent from the report of the Cumberland Committee to the Cumberland Assembly of the same year, 1904. (Paragraph 11 of Committee Report, Record, p. 66.)

A mere statement to be altered or rescinded by the General Assembly at pleasure could not, under the laws of the Presbyterian Church, be a part of its Confession or Constitution. (Record, p. 244.)

If it had been an amendment, it would nevertheless have neither changed nor altered the Presbyterian position, for it was merely a reaffirmation of what already existed; it was for a better understanding of that which was.

The Committee on Union in the Presbyterian Church, in connection with the joint report on union, in 1904, went on record, saying:

> "That the revision of the Confession of Faith (referring to the force of the Declaratory Statement) had affected no material change in the doctrinal attitude of the church." (Record, p. 274, Par. 2.)

The General Assembly of the Presbyterian Church in 1904, at the time of adopting the joint report on union, went on record as follows:

> "That the Assembly in connection with this whole subject of union with the Cumberland Presbyterian Church, places on record its

judgment that the revision of the Confession of Faith effected in 1903, has not impaired the integrity of the system of doctrine contained in the Confession and taught in the Holy Scriptures, but was designed to remove misapprehensions thereof." (Record, p. 650.)

Again as late as 1907 the General Assembly of the Presbyterian Church went on record as follows:

"We had not heard until your communication announced it, that any body had claimed or induced others to believe that the presbyterian Church, in the U. S. A., had abandoned the Westminster Confession of Faith. This is not true. The fact was in easy view of all, and nobody could have obscured it, if it had been attempted, that the reunion was effected upon the doctrinal basis of the Westminster Confession of Faith, as revised in 1903, and the other doctrinal standards of the Presbyterian Church in the U. S. A." (Record, p. 293.)

The foregoing communication was addressed to T. H. Padgett, *et al.*, who at the time comprised the General Assembly of the Cumberland Church.

UNION MOVEMENT IN THE CHURCHES.

A brief statement of the movement looking to the alleged union or merger in the churches.

This movement originated in the Assemblies

of 1903 of the respective churches, by the appointment of Committees in each. The Committee in the Cumberland body was designated as the Committee on Presbyterian Fraternity and Union, and was authorized to confer with other Presbyterian bodies in "regard to the desirability and practicability of closer affiliation and organic union among the members of the Presbyterian family in the United States." (Record, p. 60.) The like Committee in the Presbyterian body was designated the Committee on Church Co-operation and Union.

These committees met and conferred and agreed upon what they termed a joint report, which was submitted to the respective Assemblies during the year of 1904. (Record, p. 274, 303.)

The joint report submitted the following plan for what was termed a "Reunion" and "Union" of the two churches. (Record, p. 303.)

1st. The Presbyterian Church in the United States of America, whose General Assembly met in the Immanuel Church, Los Angeles, Cal., May 21st, 1903, and the Cumberland Presbyterian Church, whose General Assembly met in the First Cumberland Presbyterian Church, Nashville, Tenn., May 21st, 1903, shall be united as one church, under the name and style of the Presbyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess.

2nd. The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice.

This report, together with certain concurrent declarations and recommendations submitted therewith, coming on for hearing in the Cumberland Assembly, met with vigorous opposition by the members thereof, and was finally adopted by a small majority. (Record, p. 306.)

Incorporated in said report was a provision (paragraph 3) requiring that the "basis of union" therein set out, that is, the 2nd paragraph thereof, should upon the adoption of said report be submitted by the Moderator and Stated Clerk of each respective Assembly to the various presbyteries of the respective churches for approval or disapproval, and that the result of the vote in each presbytery should be reported to the Stated Clerk of the Assembly with which it was connected, and that the report of the vote of the presbyteries should be made by each respective stated clerk to his Assembly, meeting in 1905, and if found and declared by the Assemblies that the basis of union had been approved by a constitutional majority of the presbyteries connected with each branch of the church, then the same should be of binding force, and both As-

semblies should take action accordingly. (Record, pp. 303-304.)

In accordance with said provision the said basis of union, being paragraph two of said report, was submitted to the various presbyteries of the church, and to which they were required to make categorical answer, as follows (Record, pp. 306-308):

> "Do you approve of the 'union' and 'reunion' of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church, on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledge as the inspired word of God, the only infallible rule of practice?" (Record, pp. 303-308.)

The first paragraph of the said plan or report, by which it was proposed to affect the temporal organization of the Cumberland Church to surrender its name, existence, organization, corporate and property rights, was not submitted to the presbyteries of the Cumberland Church, neither was it submitted to the membership or congregations. (Record, pp. 308-314.)

In the Cumberland Church, with one exception, the presbyteries made categorical answer

back to the Assembly at its session in 1905, when the Assembly thereupon appointed a special committee to report the result of the action of the presbyteries(Record, pp. 73-81); this committee divided, and majority and minority reports were made to the Assembly. The majority report was adopted upon submission to the members of the Assembly present by a small margin over the minority, voting against the same. (Record, p. 81.)

The majority report was to the effect that a majority of the presbyteries (sixty of the same being in favor, and fifty-one one of the same being opposed), had approved of the proposition submitted to them. It further appeared from an exhibit attached to said report that the fifty-one presbyteries disapproving had 137 more presbyterial votes than did the 60 approving. (Record, pp. 74-79.)

The minority of said Assembly, aside from said minority report, filed a written protest against the action of the majority (Record, pp. 82-281.) The majority report carried with it a resolution to the effect that said union and reunion had been constitutionally agreed to by the Cumberland Presbyterian Church, and that the basis of union had been constitutionally adopted. (Record, p. 75.)

Embodied, also, in the Concurrent Declarations, submitted as a part of the joint report on union to the Assembly in 1904, was the following:

"In adopting the Confession of Faith of the

Presbyterian Church in the United States of America, as revised in 1903, as a basis of union, it is mutually recognized that such agreement now exists between the systems of doctrine as contained in the Confessions of Faith of the two churches as to warrant this union, a union honoring alike to both." (Record, p. 304.)

It nowhere appears that it was anywhere found that the doctrines or systems of doctrine were identical or the same.

Like proceedings were had in the Presbyterian Church touching the joint report and its submission to the presbyteries.

Upon the action of the Assemblies for the year of 1905, being consummated, committees were continued by each body for further conference and for the further purpose of working out a plan by which the union should be effectuated and accomplished. (Record, p. 98.) And said committees made supplementary joint report to their respective Assemblies in 1906, by which it was provided, that upon the adoption of the report by each of said Assemblies, the General Assembly of the Cumberland Church should adjourn *sine die*, and the synods, presbyteries, sessions, ministers and congregations of the Cumberland Church should pass to, be received by, and incorporated with the Presbyterian Church, and the same should be dissolved as synods and presbyteries of the Cumberland Church and re-

organized as like bodies of the Presbyterian Church, and with like bodies of the Presbyterian Church, and that the boards, committees, trustees and other ecclesiastical agencies of the Cumberland Church should thereafter report to the Assembly of the Presbyterian Church, and that the Confession of Faith and other ecclesiastical standards of the Presbyterian Church should at once become effective as to all ministers, elders, deacons, officers, particular churches, judicatories, boards, committees, ecclesiastical organizations, etc., of the Cumberland Church, and that the Stated Clerk of the Presbyterian Church, add and enroll all of the synods and presbyteries of the Cumberland Church as synods and presbyteries of the Presbyterian Church, and that the churches and ministers of the Cumberland Church be added to and enrolled as churches and ministers of the Presbyterian Church. (Record, pp. 307-314, 103-110.)

Said report, nor any of the provisions thereof, was ever submitted for approval or disapproval to the presbyteries, synods, sessions or congregations of the Cumberland Church, but the same was adopted by a majority of the members of the General Assembly of the Cumberland Church alone, and the validity of the same therefore rests upon the action and authority of the General Assembly of that church alone. (Record, pp. 110, 314.) Like steps were taken and had in the General Assembly of the Presbyterian Church. (Record, p. 285.)

In the Cumberland Assembly, the adoption of

said report was bitterly contested by a large number of the Commissioners present and a written protest to the action of the majority was prepared by one hundred of said Commissioners, in which the power of the General Assembly to make or entertain the proceedings had with reference to said union, or to make such union, was challenged; as was also its authority to adjourn *sine die* without naming a time and place for its next meeting. (Record, pp. 111-113.)

Upon the adoption of said report, the Moderator declared the adoption of the same, and made the announcement as required by its provisions, and afterwards declared the General Assembly adjourned, *sine die*, to meet with and as a part of the General Assembly of the Presbyterian Church, at a place to be chosen by the General Assembly of the Presbyterian Church. (Record, p. 111.)

The protesting and dissenting Commissioners gave notice upon the floor of the General Assembly, prior to and at the time of the adjournment, that they would treat said adjournment as void, and that they renounced the proceedings of the majority as illegal and revolutionary, and that the General Assembly would continue in session until its business had been transacted and would then adjourn in the regular constitutional way; and, being refused the further use of the church in which the session was being held, announced that the session would be continued in a room near by (designating it); and thereupon they

repaired to said place, supplied a Moderator and other necessary officers for the transaction of business declared the attempted adjournment illegal and inoperative and treated it and the proceedings of the majority as null and void; transacted such other business as came before it and adjourned in regular order, to meet at Dixon, Tennessee, on the third Monday in May, 1907, at which time and place it met, with duly accredited Commissioners from seventy-one out out the 114 original presbyteries of the Cumberland Church, and has met annually upon adjournment in the regular way since, and now stands to meet at a specific time and place next year. A majority of the presbyteries and synods of the Cumberland Church, as they existed at and previous to the time of the alleged union, have been and are now being maintained in the regular way, together with a great number of the membership and local congregations. Among the synods being thus maintained is the Synod of Missouri of the Cumberland Church, and among the presbyteries are each of those whose property is involved herein. Likewise, among the membership adhering are the personal defendants herein, and among the local congregations being maintained are those whose property is involved herein. (Record, pp. 286-300, 485-490.)

Defendants contend that they are maintaining the original organization of the Cumberland Church, organized in 1810, and the Missouri Synod therof, and the presbyteries and local con-

gregations thereof, in harmony with those protesting against the action of the majority in the Assembly of 1906, and who continued the session of the same after the attempted adjournment *sine die.*

THE ADOPTION OF THE BASIS OF UNION DID NOT EFFECTUATE THE UNION.

The submission of the basis of union nor the adoption or approval of the same by the presbyteries did not and was not intended to effectuate the union between the two churches. If it had effectuated the union the proceedings of 1905 and 1906 were useless and nugatory and of no effect. Besides, the Presbyterian Assembly, in connection with the submission of the same, directed as follows:

> "That the report of the vote of the presbyteries shall be submitted by the Stated Clerk to the General Assembly of 1905, and if the said Assembly shall find that two-thirds of the presbyteries of the church have approved the foregoing basis of union, then the necessary step shall be taken, if the way be clear, to complete the union with the Cumberland Church." (Record, p. 650.)

NOR DID THE BASIS OF UNION EFFECTUATE AN AMENDMENT.

No amendment to either the Constitution or the Confession of Faith, of the Cumberland Church, was effectuated by the adoption of the basis of union, nor was any amendment effect-

uated by any other or subsequent proceeding had.

The Constitution of the Cumberland Church provides how the Constituion or the Confession may be amended, and this method is exclusive. (Record, p. 321.) It was not pursued in this case.

Again, the matter submitted to the presbyteries in the basis of union was only a question of faith, or creed, and if held to be an amendment would only be an amendment to the Constitution. The Constitution and Confession of Faith are two distinct articles. The Constitution has alone to do with the organization and government of the church, its temporalities, its tangible, physical and corporate rights; while the Confession has alone to do with the intagible, the doctrine, the creed and faith, professed and held. The one relates to the temporal church, the other to the spiritual and invisible. The change of name surrender of organization, corporate and other rights, could only be accomplished if at all through an amendment to the Constitution. No such proposition was ever submitted, and no amendment authorizing it was ever had.

NOT A UNION BUT A MERGER.

The following resolutions adopted by the General Assembly of the Presbyterian Church, show the attitude of the Presbyterian Church throughout the entire proceedings, with reference to the matters in hand, and that the pro-

posed action was not considered or treated at any time as a union between the two churches, but as a merger pure and simple of the Cumberland Church into that body, and a complete destruction of the Cumberland Church.

> "That the said Committee be and is hereby authorized to confer with the trustees of the General Assembly, if and when necessary, in order to safeguard the corporate or property rights of the Presbyterian Church upon and after the completion of the proposed union." (Record, p. 650.)

Reference was made to the Committee having in charge the matter of union with the Cumberlands.

In 1906 the following report was made to the Presbyterian Assembly by the Committee having in charge the proposed union with the Cumberland Church:

> "Your Committee was authorized to confer with the trustees of the Assembly in order to safeguard the corporate rights of the Presbyterian Church in the United States of America as a whole. The trustees referred the matter to their solicitors, and these legal gentlemen drew up an opinion which was submitted to your committee, and from this opinion we quote as follows: 'The solicitors have not been advised as to the ecclesiastical effect of the proposed union of the Presbyterian

Church and the Cumberland Church. It is a fact to be noticed, however, that these bodies were once united; they disrupted and they propose to unite. If the effect of this union be that the integrity of the organization of the Presbyterian Church shall be maintained and continued, and its doctrines, tenets and beliefs, as held in the years of 1904 and 1905, be adhered to, the Cumberland Church, becoming an integral part of the Presbyterian Church or merged into that body, then in such case the property and the various trusts which are held by the corporation and the trustees of the General Assembly of the Presbyterian Church in the United States of America will not be affected or disturbed by such agency. The Committee have also to state that it has secured upon this subject of property rights the opinion of the legal counsel of all the boards of the church and that these are in its possession. The counsel of the board located in New York advise that particular care be taken in framing resolutions to complete the union and reunion, so as to make it clear that the Presbyterian Church in the United States of America would continue its existence, both ecclesiastically and legally, and that the Cumberland Church was reunited with and incorporated into said Presbyterian Church. * * * Further, it has been distinctly understood in all of the judgment findings of the two committees on union, that this particular union was a reunion; that the continued ecclesiastical and legal existence of the

Presbyterian Church, U. S. A., was and is fundamental to the reunion, and that the reunited Church would be the Presbyterian Church, U. S. A., which existed in 1799, 1836, 1870 and 1903. It is believed that the continued ecclesiastical and legal existence of the Presbyterian Church, U. S. A., has been acknowledged and secured by the resolutions of the joint report." (Record, p. 651.)

In the minutes of the Presbyterian General Assembly of 1906 is found in the following announcement by the Moderator:

"In the name of the General Assembly of the Presbyterian Church in the United States of America and of the General Assembly of the Cumberland Presbyterian Church, I make announcement that the following synods and presbyteries, with their ministers and churches, have been received into and incorporated with the Presbyterian Church in the United States of America, and their names are therefore placed upon the Roll of the General Assembly."

Then follows a list of the same, which includes all of the synods, presbyteries, ministers and churches of the Cumberland Church. (Record, pp. 136-137.)

MOUNT CARMEL CHURCH.

Long prior to the institution of this suit, representatives of the one class arising in the Mount Carmel congregation of the Cumberland

Church in Henry County, Missouri, contested with representatives of the other class arising in said congregation, the right to the use, ownership and control of the local church house and other property belonging to said congregation at the time of the union or merger, in the Circuit Court of Henry County, Missouri, and a final judgment was rendered in said cause, adjudging the right to the use, possession, control and ownership of said property to the Cumberlands. (Records, pages 652 to 655.)

Representatives of the said Cumberland class in said Mount Carmel congregation are again sued herein, and the same identical property as was involved in the suit above mentioned, is again brought in litigation herein, that the right to the possession, use, control and ownership of the same may be again determined between said classes.

The defendant J. G. Turk is made a party hereto as representing the Cumberland class in said congregation. (Page 574 of the Record.) The said proceedings and final adjudication in said Circuit Court of Henry County are set up in the answer herein as a bar to this suit. (Record, pp. 631 and 632.)

As stated, the various local church houses involved herein are in the most instances held under deeds or conveyances to certain named parties as trustees, and their successors, for the respective local congregations mentioned in the

deed. Usually this trustee was some local person or persons, selected from the congregation. A fair illustration of the deeds in most instances is found in the deed to the property at Marshall, Missouri, which reads as follows: "to G. E. C. Sharp (and others, naming them), trustees of the Cumberland Presbyterian Church, of Marshall, Missouri, and their successors." (Record, p. 558.)

In some instances the property was deeded to trustees for the presbytery, within the bounds of which it was located, as in the instance of the property at St. Joseph, Missouri, and at Nevada, Missouri. (Record, pp. 568, 569.)

In some instances it was deeded direct to the congregation (incorporated), as shown by the deed to the West Plains congregation, at page 606 of the Record.

In some instances direct to the presbytery for the use of the local congregation, as at Campbell, Missouri. (Record, p. 611.)

The complainants upon the trial introduced certain matters found from pages 189 to 225 of the Record, showing conveyances or dispositions ordered by various presbyteries, synods, and the General Assembly of various properties, for the purpose of showing an asserted claim by said bodies over the local property of the congregations, under the laws and usages of the church, and an recognition of said claims by said con-

gregations under such laws and usages. However, it is not believed that such evidence is of any force, for the reason, among others, that it does not appear whether such property was, under the respective deeds by which it was severally held, the property of local congregations, or held for the use of such, or whether it was the property of the presbyteries, synods and General Assembly disposing of the same.

This is a controversy respecting the ownership and the right to the possession, use and control of certain local church houses of worship in the State of Missouri, belonging to certain local or particular congregations of the Cumberland Presbyterian Church in the State of Missouri, and also of certain presbyterial funds and properties in the State of Missouri, belonging to certain presbyteries of the Cumberland Presbyterian Church in the State of Missouri, and arises out of the attempted absorption of the Cumberland Presbyterian Church, hereinafter denominated the Cumberland Church, by the Presbyterian Church in the United States of America, hereinafter denominated the Presbyterian Church, or from the attempted merger of that Church into the Presbyterian Church, commonly referred to as a union between the two churches.

The Cumberland Church exists as a separate and distinct unincorporated or voluntary association from the Presbyterian Church, and has existed as such since the year 1810, the date of its founding.

On the 24th day of May, 1906, a certain plan or scheme, looking to the adjournment *sine die* of the General Assembly of the Cumberland Church, and for the passing of its synods, presbyteries, sessions, ministers and congregations, into the Presbyterian Church, and for their reception by the Presbyterian Church, and for the report of all the boards, committees, trustees and other ecclesiastical agences of the Cumberland Church to be thereafter made to the Presbyterian Church, and for the making of the Confession of Faith and other doctrinal and ecclesiastical standards of the Presbyterian Church, at once effective as to all ministers, elders, deacons, officers, particular churches, judicatories, boards, committees, ecclesiastical organizations, etc., of the Cumberland Church, and for the enrollment of all the synods and presbyteries of the Cumberland Church, as synods and presbyteries of the Presbyterian Church, and for their disorganization as Cumberland and reorganization as Presbyterian bodies and for the enrollment of the ministers and churches of the Cumberland Church, as Churches and ministers of the Presbyterian Church, was adopted and declared effective by the General Assemblies of the Cumberland Church and of the Presbyterian Church. (Record, pp. 105-110.)

At the time of the adoption of said plan or scheme, many of the local congregations of the Cumberland Church in Missouri, including those involved herein, had acquired and owned

the respective church houses in which they worshipped, and held the same under deeds or conveyances, by which they had been conveyed to trustees or officers of the respective congregations, by name for the use and benefit of such congregations; likewise, many of the presbyteries of the Cumberland Church, in Missouri, including those involved herein, had by bequest, donation and otherwise, acquired certain funds and properties, which said respective funds and properties were being held by certain named local trustees for each respective presbytery, and for the use and benefit of each respective presbytery, to which any certain fund or property might belong. (Stipulation, Record, p. 34; Record, pp. 558-632.)

A division arose in the Cumberland Church by reason of the agitation and attempted promulgation of said scheme or plan of merger and absorption, which extended from and through many of its congregations, sessions and presbyteries up and through the synods and General Assembly, and resulted in two classes of each said bodies, one of which approved said merger and absorption, and upon the promulgation thereof asserted its validity and claimed to have become Presbyterians, and members of that church, and that the congregation, presbytery, synod or General Assembly, to which such class belonged, had become a congregation, presbytery, synod or General Assembly of the Presbyterian Church; and the other of which disapproved said merger and absorption and refused

to recognize the same as legal or binding, but continued as Cumberlands and adhered to its organizations, and continued its congregations, sessions, presbyteries, synods and General Assemblies. (Stipulation, Record, p. 34.)

Such divisions involved many of the local congregations of the Cumberland Church, in Missouri, including those involved herein, with the result that a controversy at once arose between the classes arising in each local congregation concerning the ownership and the right to the possession, use, enjoyment and control of the local property belonging to such respective local congregation at the time of said division, each class claiming to be the original and true congregation and church mentioned in the deeds under which said property was held, and each class claiming to be the exclusive owners of all such property, and entitled to the exclusive possession, use and control of all such property. Likewise, such divisions involved many of the presbyteries of the Cumberland Church in the State of Missouri, including those involved herein, with a result that a controversy at once arose, between the classes arising therein in each of said presbyteries, concerning the ownership and the right to the use and enjoyment of the presbyterial funds and properties belonging to such presbytery at the time of such division, each class claiming to be the original presbytery of the Cumberland church to which said funds and properties belonged at the time, and as such asserting the ownership and the right to the pos-

session and enjoyment of all said property exclusively.

At Warrensburg, Missouri, this controversy found its way into the Circuit Court of the state, through a suit instituted by representatives of the Presbyterian church, in behalf of all the members thereof, and especially in behalf of all such members as were formerly members of the Cumberland church, but who had by reason of the scheme of merger become adherents and members of the Presbyterian church, against representatives of the opposing class, denying the validity of the union and continuing adherence to the original Cumberland organization. The ownership and right to possession and use of the local church property of the Warrensburg congregation of the Cumberland church, at the time of the alleged merger was involved. The construction of the deeds under which the property was held, the determination of the character of the property, and the determination of who were beneficiaries of said property under said deed, together with the determination of the question of the validity or invalidity of said union or merger, were direct questions and issues involved in said cause. The cause finally reached the Supreme Court of the state, and it was finally adjudged by that court that said union was invalid and of no legal effect whatever, and that the property according to the terms of the deed was trust property, and the beneficiaries, the Warrensburg congregation of the Cumberland church, and that those mem-

bers of said congregation continuing at the time and afterwards in adherence to the Cumberland organization and refusing to recognize the union, were identical with the original congregation and entitled to the property, and that those abandoning the Cumberland organization and going into the Presbyterian church had forfeited all interest in the property. Said case is entitled *Boyles et al.* v. *Roberts et al.*, and is reported in the 222d Vol. of the Missouri Supreme Court reports, at page 613 thereof. (Record, pp. 412-450.)

Immediately upon said disposition of said cause by the Supreme Court of the State of Missouri, the present suit was filed on the 13th day of November, 1909, and its obvious purpose was to avoid the effect of the final opinion and judgment of the Supreme Court of Missouri, in that case adjudging said merger invalid and in adjudging the interests of the parties the deed in question.

The court rendered a decree for the complainants.

It decreed the alleged union to be valid and binding upon all classes of persons represented by the complainants, who affirmed the validity of the union, and binding upon all classes of persons represented by the defendants, who denied such validity; it held that the complainants were proper representatives of the one class and the defendants were proper representatives of the other class.

That the united church and the complainants and those represented by them were entitled to all the property described in the bill and the amendments thereto (with minor exceptions), and the title thereto was quited in said united church, free from all right, title or claim of the defendants or those represented by them, who denied the validity of the union.

The defendants were enjoined from any interference. (Rec., pp. 687-9.)

The appeal of the defendants to the United States Circuit Court of Appeals was allowed June 5, 1914. (Record, pp. 102-4.)

COLLEGE CASE.

This is a controversy involving the owenrship and right of control and management of Missouri Valley College, and the property, real and personal, held in trust by it, and arises out of the attempted absorption of the Cumberland Presbyterian church, (hereinafter designated the Cumberland church), by the Presbyterian church in the United States of America, (hereinafter designated the Presbyterian church, or from the attempted merger of that church into the Presbyterian church, commonly referred to as a union between the two churches.

Missouri Valley College is an educational institution, located at Marshall, Saline county, Missouri, incorporated under the laws of the State of Missouri, under and in accordance with

directions of the synods of Missouri and of Kansas of the Cumberland church, and at the time of the adoption of the said plan or scheme of union above referred to, had a productive endowment fund of about $185,000.000, and other real and personal properties approximating a valuation of about $225,000.00, and was in accordance with the terms of its charter and other provisions of the trusts under which it was founded, under control and management of said synods, through trustees appointed therefor. A brief history of the founding and establishment of said college, the acquisition of its endowment and other properties, and of its growth and management, and of the trust upon which it had been raised and was being held is hereinafter more fully set out.

THE BILL OF COMPLAINT.

This action was brought on November 13, 1909. (Record, p. a.). The bill of complaint is found in the printed record at pages 27-33.

The complainants were "The Synod of Kansas of the Presbyterian church in the United States of America, H. G. Mathis, R. Thompson, William Foulkes, J. B. Larimer, Samuel Garvin, and Charles M. Tabler;" the defendants were Missouri Valley College, a corporation, J. W. Duvall, and 12 other persons.

The bill of complaint averred that the complainants, The Synod of Kansas, was a religious corporation, organized and existing under the laws of Kansas, and a citizen and resident of

that State, and that its co-complainant, Mathis and others, were also residents and citizens of the State of Kansas; that the defendant the missouri Valley College, was a corporation existing under the laws of Missouri, with its chief office at Marshall, in Saline county, in said state; and that all the individual defendants were citizens and residents of Missouri.

The bill averred that the case arose under the laws and constitution of the United States; that the individual complaints were officers and members of and represented The Synod of Kansas of the Presbyterian church in the United States of America, which was composed of several hundred members, citizens and residents of Kansas; that the individual defendants were members, agents, and representatives of what had been and still was claimed by them to be the Missouri Synod of the Cumberland Presbyterian church in Missouri, a voluntary religious organization, designated in the bill by the words, "Missouri Synod."

The bill averred that the Cumberland Presbyterian church, up to the year 1906, was an unincorporated, voluntary religious society, having a gradation of church courts, each having certain control of the others, the one called the "General Assembly" being the highest of these courts, and being made up of three or more "presbyteries." The General Assembly was invested, by the rules and regulations of the church, with legislative, executive and judicial

authority, with power to decide all questions of law, doctrine and ecclesiastical polity.

That in 1881 there were three synods in Missouri, known as the McAdow Synod, the Missouri Synod, and the Ozark Synod of said church; and in Kansas there was one synod, known as the Missouri Valley Synod. The four synods of the two States formed and created an "Educational Commission," which was incorporated under the laws of Missouri; its purpose was to collect a permanent fund for a permanent endowment of an institution of learning, to be under the joint ownership and control of said four synods. The charter of this Educational Commission provided that it should hold in trust for the synods, all the funds raised for the purpose and as soon as $100,000 should have been raised, notice was given to the synods, and the synods were then to elect a board of trustees for the proposed institution of learning, each trustee to hold his office subject to the pleasure of the synod which should elect him; and when the board of trustees should have been elected all the funds and property of every kind were to be turned over to that board, and the Educational Commission should cease to exist.

After the incorporation of the Educational Commission, and before its purpose had been accomplished, the McAdow, the Missouri and the Ozark Synods were combined, and were succeeded by the Missouri Synod of the Cumberland Presbyterian church; and the Missouri

Valley Synod was succeeded by the Kansas Synod.

Afterwards, in 1888, said Educational Commission having raised about $100,000, the Kansas Synod, as successor to the Missouri Valley Synod, and the Missouri Synod, as successor to the three other synods, elected 13 trustees, who then incorporated themselves under the name of Missouri Valley College, under the laws of the State of Missouri. The funds were then turned over to the board of trustees of the Missouri Valley College.

The bill of complaint then proceeded to state, in general terms, that in 1906 a union was accomplished between the Presbyterian church in the United States of America, and the Cumberland Presbyterian church, upon the basis that the united church should be known as the Presbyterian church in the United States of America; that in consequence thereof the two churches became one church under the name last mentioned, and also became the legal successor of the Cumberland Presbyterian church; that as a result of said union, whatever title, legal or equitable, to any property, or right to control, possess or use the same, that was possessed by any of the members, judicatories or other ecclesiastical agencies of the Cumberland Presbyterian church, passed, by operation of law, to the membership of corresponding judicatory or agency of the united church, and all the members, including ministers of the Cumberland

Presbyterian Church renounced the united church thereby ceased to be members of such church, and thereby vacated their positions as pastors and members of presbyteries and synods, and all such renouncing officers, members of boards or committees, or persons in other ecclesiastical positions, vacated their respective offices and positions and relinquished all their right in and in relation to all church property.

That the Synod of Missouri of the Cumberland Presbyterian church, in October, 1905, while proceedings for said union were pending, adopted a resolution instructing the board of trustees of the Missouri Valley College to take such steps as might be proper to secure the title to the college and its property to the united church.

That the Kansas Synod of the Cumberland Presbyterian church, in October, 1905, adopted a similar resolution.

The bill averred that the individual defendants were members of what was formerly the Cumberland Presbyterian church, and after the union had refused to recognized it, and, with their associates, attempted to perfect an organization in the name of the Cumberland Presbyterian church, and claimed to be the original Cumberland Presbyterian church, The official positions in the church of the different defendants were then stated.

The bill averred that the pretended Missouri

Synod of what was claimed to be the Cumberland Presbyterian church had elected certain of the defendants as trustees of the college, and they were authorized by said alleged synod, as its agents, to take any and all steps necessary to obtain charge, control and possession of the property of the Missouri Valley College; that those who were named as defendants in the bill, represented, in their church official positions, such a relation to the renunciation movement and those engaged in it, as to fairly represent said synod.

The bill stated that the defendant, Missouri Valley College, was a corporation organized under the laws of Missouri, and had acquired and held in trust real estate in Marshall, Saline county, Missouri, described in the bill and pleadings, a library, furniture and securities, all of the value of more than $400.00.

The bill averred that all of the property belonged to the Synod of Kansas of the Presbyterian Church in the United States of America, and to the Synod of Missouri of the Presbyterian church in the United States of America, and was held in trust for them by the defendant, Missouri Valley College; that there was no dissent to the union in the State of Kansas, and there existed, at the time of the filing of the bill, no organization in Kansas claiming to be the Cumberland Presbyterian Church, nor any synod of that church, but that the entire membership recognized the union of the two churches,

and the complaintants as their representatives.

The bill further stated that the individual defendants claimed to be the synod of what was the Cumberland Presbyterian church, and as such claimed to be the beneficial owners of all the property of the college; that the defendants denied any interest of the complainants and those whom they represented in the property; that the defendants were setting up said claims, disputing the complainants, and injuring the cause of the college by depriving it of students and threatening it with expensive litigation. That the individual defendants, claiming to have been elected by the Missouri Synod of the Cumberland Presbyterian church as trustees of the college, insisted that they were, by said synod, instructed to demand of the college and its officers and trustees, the possession and control of all the property held by said college, and, if such demand was not complied with, to institute legal proceedings therefor. That pursuant to said direction, the said defendants had demanded of the college and its trustees the possession of the property, and were threatening to carry on, as between themselves, legal proceedings therefor and respecting the same; but it was alleged in the bill that the complaintants were entitled to have their right in the property adjudicated and quited as against all claims made or that might be made by the Missouri Synod of what was the Cumberland Presbyterian church, or by any person or persons claiming under it, and to have the defendants perpetually enjoined from the claiming title to the property of

from interfering with the management of the property or said college.

The bill averred that the Kansas Synod, the corporated complainant, was organized and incorporated by the voluntary association for the purpose of supporting public worship and education and exercising general supervision over the religious and educational affairs of the presbyteries, churches, schools and colleges, and in holding, owning and controlling such real property as might be vested in it, and that said corporation was subject to the control of the voluntary association, and whatever property it held or owned, it held in trust for said association.

The bill averred that the individual defendants asserted that the law of Missouri, evidenced by the decision of the Supreme Court of the State in cases of *Watson* v. *Garvin*, 54 Mo., 377, and *Boyles* v. *Roberts*, then unreported, was that no union of the religious organizations, such as that described in the bill, was of any validity, and that when made it was the duty of all the officers and members of the original Cumberland Presbyterian church to renounce, and that such as did not do so, by their failure forfeited all right to and interest in the property of the Missouri Valley College; and that although the church tribunals had decided that the union was valid, such decision could not be recognized or enforced by judicial tribunals, the individual defendants, claiming this to be the law, threatened and proposed to have it so en-

forced; that such a law, so enforced, would deprive the complainants and those whom they represented of the equal protection of the law, would take their property without due process of law, and unreasonably abridge their privileges and immunities as citizens of the United States of America, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The bill then invoked the protection of the constitutional amendment aforesaid. It was averred that said amendment also gave to the complaintants the right and privilege of belonging to religious organizations and agreeing, as it was said had been done in this case, that the decisions of the church tribunals should be binding as to when and under what circumstances a union could be perfected between the two churches.

The prayer of the bill was that the defendants, expect the Missouri Valley College, be adjudged to have no right or title in or to the real estate or trust funds, and no right to the control or possession thereof; that the Missouri Valley College be adjudged to be vested with the legal title to all of the property for the benefit of the complainants, and that the defendants, except the Missouri Valley College, be enjoined from claiming or asserting any title thereto, or in any way interfering with the management or control of the property.

A demurrer to the bill was filed by the defend-

ants, except the Missouri Valley College, which was overruled. This has not been incorporated in the record.

A plea to the bill, for want of indispensable parties, was also filed. This was likewise overruled. (Rec., p. 667.)

This plea, which, by leave of court, was afterwards renewed and its matter incorporated in the answer, is, in order to avoid unnecessary repetition, omitted from the record.

The defendants, except the Missouri Valley College, afterwards filled their point and several answer to the bill of complaint. (Record, pp. 511-546.)

THE ANSWER.

The answer denied that the controversy was wholly between citizens of different states, or that the case arose under the laws and constitution of the United States; it averred that, on the contrary, the controversy was wholly between citizens of the State of Missouri.

The answer admitted many of the allegations of the bill in reference to the constitution of the Cumberland Presbyterian Church. (Rec., pp. 512-13.) It denied that the General Assembly had power to decide all questions of law, doctrine, or ecclesiastical policy; it admitted the averments of the bill in reference to the synods of the Cumberland Presbyterian church in Missouri and Kansas in 1881, and the formation and incorporation of

the "Educational Commission," the purpose of its creation, the combination of the three Missouri synods, and the succession by the Kansas Synod to the powers of the Missouri Valley Synod; the election of 13 trustees, 10 of whom were elected by the Missouri Synod, and 3 by the Kansas Synod; and that such trustees incorporated themselves under the name of the Missouri Valley College, under the laws of the State of Missouri, and that to them was turned over by the Educational Commission all the funds which had been collected. (Rec., p. 515.)

The answer admitted the existence of the Presbyterian church in the United States of America. It denied the validity of the union of the two churches by their presbyteries and General Assemblies. It averred that the action taken for that purpose was illegal and inoperative. It denied that any union was, in 1906, or at any other time, consummated, and denied that it was binding upon either of said denominations. It denied that the two churches became one, or that the united church became the legal successor of the Cumberland Presbyterian church. It denied, generally, the effect ascribed to the union by the bill of complaint, and averred that all the property of the Cumberland Presbyterian church and its judicatories, agencies and congregations remained in the members, judicatories and agencies of the Cumberland church, the same as before the alleged union took place. (Rec., pp. 513-14.)

The answer admitted that the Synod of Mis-

souri, in October, 1905, passed a resolution regarding directions to the trustees of the Missouri Valley College, as set out in the bill that said synod had any power to pass any such resolution, or that the same was binding, or that it operated to change or transfer any of the property therein referred to from the ownership, possession, control or management of the Missouri Synod of the Cumberland Presbyterian church; that such instructions and directions were wholly nugatory and of no effect, for the reason that said synod had no power to give them.

The answer admitted that the defendants were, prior to May, 1906, members of the Cumberland Presbyterian church, and averred that they were still such members, and refused to become members of the Presbyterian church under the alleged union or otherwise; it denied that the defendants had attempted, with others to effect an organization in the name of the Cumberland Presbyterian church after the date of the alleged union, but averred that they and other members of that church had remained members thereof, and had gone on since that date, as before, in the transaction of its business, as members and officers of the Cumberland Presbyterian church, being the same organization as at the foundation of that church in the year 1810.

The answer averred that the Missouri Synod of the Cumberland Presbyterian church is a

valid and legal body of the Cumberland Presbyterian church regularly constituted according to the laws of the church, and that said synod had elected as trustees of the Missouri Valley College certain of the defendants, and that it had directed them to take any and all necessary steps to obtain charge, control and possession of its property.

The answer denied that the defendants or other Cumberland Presbyterians with whom they were associated bore any relation whatever to a so-called "renunciation movement," as alleged in the bill, but said that they were and had been since May, 1906, attempting only to maintain the integrity of the Missouri Synod of the Cumberland Presbyterian church, and refusing to go into the Presbyterian church in the United States of America by virtue of the alleged union.

The answer admitted the corporate existence of the Missouri Valley College. It denied that all the property of the college or any of it belonged to the Synod of Kansas of the Presbyterian church in the United States of America, or to the Synod of Missouri of the Presbyterian church in the United States of America, or either of them, or that it was held in trust for them or either of them by the Missouri Valley College.

The answer averred that all of the property belonged to the Missouri Synod of the Cumberland Presbyterian church; that the Kansas Synod of the Cumberland Presbyterian church

ceased to exist in May, 1906, and that all of the property should be held in trust for the Missouri Synod of the Cumberland Presbyterian church by the Missouri Valley College.

The answer admitted that there was not, at the time of its filing, any organization in Kansas claiming to be the Cumberland Presbyterian church, or any synod in that State of that church, or any local congregations thereof. It averred that a large percentage of the former membership of the Cumberland Presbyterian church in Kansas became members of the Presbyterian church, and that some of them became members of other churches. It denied that those who became members of the Presbyterian Church transferred the former organization of the Cumberland Presbyterian church to the Presbyterian church, or that they thereby transferred the Kansas Synod to the Presbyterian Church in the United States of America or to the Kansas Synod thereof, and it denied that the complainants had or could represent the said former Cumberland Presbyterian church or the former Synod of said Cumberland Presbyterian church in this action.

The answer denied that the defendants claimed to be the synod of the Cumberland Presbyterian church and as such the beneficial owners of the property of the college. It averred that all the defendants are members of the Cumberland Presbyterian church within the bounds of the Missouri Synod of that church, and that as such

they are among the beneficiaries of the property held by the college; it alleged that some of them were trustees of the Missouri Valley College and others of them were officers of the Missouri Synod of the Cumberland Presbyterian church; it asserted that the defendants did claim that the Missouri Synod of the Cumberland Presbyterian church was beneficial owner of all the property held by the Missouri Valley College.

By the answer the defendants admitted that those of them who were elected by the Missouri Synod of the Cumberland Presbyterian church as trustees of the college, were by said synod instructed to demand, not of the Missouri Valley College or its legal officers or trustees, but of those persons who were in the wrongful possession and control and claiming to be its officers and trustees, the immediate possession and control of all the property of the college, to the end that they, the defendants, as the lawful trustees thereof, might administer and manage the college and its property for the purposes to which it was originally devoted.

The answer said that, pursuant to said instructions of the Missouri Synod, those of the defendants who were such trustees did make such demand and during their suit in the Circuit Court of Saline County, Missouri, in which county the property was located, against the persons so in the wrongful possession of the college and its property, for the possession of all

of its property, which suit was, at the time of the filing of the bill and was still, pending.

The answer denied that the complainants had any right in the property or that they were entitled to have such right adjudicated or quieted as against the claims made by the defendants, or against any other claims which might be made by the Missouri Synod of the Cumberland Presbyterian church.

The answer then denied that the corporate complainant was organized and incorporated by any voluntary association whatever. It averred that the corporation complainant first became a corporation on September 22, 1909, by filing its charter in the office of the Secretary of State of Kansas on said date; that the purposes of said corporation, as stated in its charter, were to support public worship and education by exercising general supervision over the religious and education affairs of Presbyterian churches, schools and colleges in the State of Kansas, and holding, owning and conveying such real and personal property to which the title might be vested in it for the purposes of such support and supervision.

The answer then averred that said charter did not authorize said corporation to acquire any interest in any real personal property outside of the territorial limits of the State of Kansas, or to support public worship or education outside of the State of Kansas, or to exercise any

supervision whatever over religious or educational affairs of Presbyterian churches or schools or colleges outside of the State of Kansas; and therefore it had no interest and could not lawfully possess any interest, direct or indirect, in the property, real or personal, in controversy in this action, all of which is situated in Saline county in the State of Missouri, and that said corporation was and must be an entire stranger to the controversy here involved, and could not be heard to maintain this suit or assert any interest in the controversy or be a party complainant therein.

The answer further denied that the corporate complainants was subject to the control of the alleged voluntary association or that whatever property it held or owned it held in trust for the alleged voluntary association; it denied the existence of any such voluntary association. It averred that said voluntary association had no interest of any nature whatever in the property in controversy in the suit; and it denied that the individual complainants, or any of them, were representatives of any such voluntary association, and averred that none of the individual complainants had any interest of any nature in the property, real or personal, involved in this controversy and could have no standing as complainants in this action.

As to the averments in parapragh 10 of the bill of complaint, the answer denied that the defendants made claim or assertion in the man-

ner and in the language and form stated in that paragraph of the bill.

The answer proceeded to state what the defendants did claim and assert in respect of the opinion of the Supreme Court of the State of Missiouri, in the case of *Boyles et al.* v. *Roberts et al.*

The answer denied that anything had occured which entitled the complainants to invoke the protection of the Fourteenth Article of Amendment to the Constitution of the United States.

Paragraph 11, 12, 13 and 14 are found in the printed Record on pages 519-539. No attempt will be made at this point to state in detail the averments of this part of the answer. They will be referred to at length in the brief, and to repeat them fully here would make this statement unduly prolix. It is sufficient, it seems to us, to state that this part of the answer set out with particularity the events and the proceedings which finally resulted in the alleged merger of the two churches, and stated why, from the point of view of the defendants, the same was illegal and void:

First: In certain respects the vital doctrines of the creeds of the two churches are different and in direct conflict with each other, and for this reason there was no constitutional authority in any body or bodies of the Cumberland Presbyterian church to form a union or merger with the Presbyterian church, which should be

binding upon the members of the Cumberland Presbyterian church.

Second: Even if the creeds of the two churches had been substantially the same, there existed no authority in the General Assembly of the Cumberland Presbyterian church to enter into any contract of union with the Presbyterian church which should submerge the identity of the Cumberland Presbyterian church and terminate its existence; and any such contract would not be binding upon the membership of the Cumberland church.

Third: Only a part of the proposed plan of union was submitted to the Presbyteries of the Cumberland Presbyterian church. A vital and essential part of it was never submitted to them at all.

Fourth: The proposition for the union was not fairly submitted to a vote of the General Assembly of the Cumberland Pesbyterian church.

Paragraph 15 of the answer (Rec., pp. 539-42) was a re-statement, by leave of court (Rec., p. 711), of the matters contained in the plea which had been overruled by the court. It averred that certain persons named in the paragraph were necessary and indispensable parties to the bill of complaint, and that the court should not and could not proceed to a determination of the controversy involved unless they were made parties thereto, and that all of them were citizens and residents of the State of Missouri, and

some of them inhabitants of and resided in the Western Division of the Western Judicial District thereof.

That the Missouri Valley College mentioned in the bill of complaint was a corporation created and organized under and by virtue of the laws of Missouri, and became incorporated as such on June 30, 1888; certain provisions of the articles of association were set out in the answer and a copy of the charter was attached as an exhibit and made a part of the answer.

The persons whom the answer averred were indispensable parties to the suit were acting as the board of trustees of the college in pursuance of their election as such by the Synod of Missouri of the Presbyterian church in the United States of America, and were recognized as such trustees by said synod and the Synod of Kansas of said Presbyterian church in the United States of America, and as such they declared their allegiance to said synods; that said persons claimed, asserted and declared that they constituted the only legal board of trustees of said Missouri Valley College, and that under said claim they were, in the name of the said Missouri Valley College, in the actual possession of the property described in the bill, managing and controlling the same, and performing and assuming to perform the duties imposed upon the board of trustees by the charter of the college.

The answer averred that these persons dis-

puted the title of the defendants as trustees of the college and excluded them from any control of its property or from any voice in the management of its affairs; that the defendants, whose title was thus disputed, asserted and claimed that they constituted the only legal board of trustees of the college, and that as such, instead of the persons then in possession and claiming to be trustees, they were entitled, as the only legal trustees, to the possession of the property of the college and the control and management of it affairs.

The answer averred that the purpose and object of the bill of complaint was to obtain a decree of court establishing and declaring valid the title of the persons whom the defendants by the answer averred were indispensable parties to the bill, as members of the board of trustees of the college, and to confirm and have established as valid their claims, as trustees, to the possession of the property of the college, and their claim to the exclusive control and management of its affairs as against the claim of the defendants that they (the defendants) were the only legal trustees of the college and as such entitled to the possession of its property and the control and management of its affairs.

The answer further averred that the bill was filed and the suit prosecuted for the benefit and in the interest of the said persons averred by the defendants to be indispensable parties to the bill; that said persons were, in fact, actively

promoting the prosecution of the suit; that certain of the defendants were, in accordance with the provisions of the charter of the college, duly elected members of the board of trustees of the college by the Synod of Missouri of the Cumberland Presbyterian church, and in their claim to be the legal trustees of the college, sustained the same relations and connection with the Cumberland Presbyterian church and the Missouri Synod of that church, as did those said persons whom the defendants averred were indispensable parties to the bill sustain to the Presbyterian church in the United States of America and the Missouri Synod thereof.

The answer stated that the interests of those persons whom the defendants averred should be parties to the suit were, therefore, directly opposed to the interests of the defendants; that if the suit proceeded to a decree, the right of one board of trustees to the possession of the property and to exercise the functions conferred by the charter of the college upon the board, would be established and declared, and the members of the other board would be decreed to have no right to such possession or to exercise such functions, and that, therefore, the members of both boards of trustees were indispensable parties to the action; and the answer prayed the court that they be made parties thereto.

The next paragraph of the answer was the same as paragraph 21 of the answer in the General Church Case (*ante* . . . .).

The answer further averred that the complainants and those for whom they sued had no interest in any of the property mentioned in the bill of complaint or its amendments, unless and except by virtue of said alleged union and merger, which had, by the Supreme Court of Missouri, been adjudged invalid, null and void; and that complainants had brought said bill for the obvious purpose of defeating the result of that decision and nullifying the same; that complianants had, by said suit, invoked the jurisdiction of the court, in order to reopen a controversy settled by the Supreme Court of the State, within whose territorial jurisdiction the property involved was situated; that they intentionally and improperly omitted to make as parties to said suit the persons whom the answer averred were indispensable parties thereto, because if they had been made parties, as they should have been, the case would not have presented a controversy between citizens of different States; but the controversy would have been one between the persons whom they had so omitted to make parties, citizens of Missouri, on the one side, and the answering defendants, also citizens of Missouri, on the other side.

The answer averred that the complianants ought not to be permitted to improperly make, join and omit parties, for the purpose of presenting a supposed and unreal controversy between citizens of different States, and to create thereby a cause cognizable in this court, when, in fact, as shown in said answer, the real con-

troversy was between citizens of the same State.

The complaints filed the general replication. (Rec., p. 667.)

THE EVIDENCE.

In the year of 1874, the synods of Missouri, McAdow, Ozark and Missouri Valley of the Cumberland church (later comprising the synods of Missouri and Kansas), originated the movement for the establishment and endowment of a church school or college, for the advancement of the interests of the Cumberland church, and to belong to and be under the control of said synods or their ecclesiastical successors in said church, which culminated in the establishment of Missouri Valley college about the year of 1888, the subject of this controversy. (Record, p. 141.)

The respective synods mentioned were judicatories of the Cumberland church, embracing within their jurisdiction that portion of the church residing within their respective bounds, and were themselves unincorporated voluntary associations. The synods of Ozark, McAdow and Missouri, formerly embraced the northern, northeastern, eastern, central and southwestern portions of the State of Missouri, while the Synod of Missouri Valley embraced the northwestern portion of Missouri, and the states of Kansas, Nebraska and Colorado. Later these synods by a process of division and consolidation were reduced to two in number, the synod of Missouri embracing the State of Missouri and

the synod of Kansas embracing the states of Kansas, Nebraska and Colorado. (Record, p. 168.)

The movement assumed definite form in said bodies by the adoption of resolutions reciting the importance of the establishment of a first-class college in the church to be located in Missouri Valley, and proposing the joint action of the said synods in establishing and maintaining such a college, with a permanent endowment fund of not less than $100,000.00, to be raised by contributions, and to be under the joint ownership, control and management of said synods. (Record, p. 141.)

The plan of co-operation between the synods, the methods and agencies to be employed in raising the moneys, in establishing, maintaining and managing such institution were also provided by said resolutions; joint ownership, management and control of such institution by said synods, was also provided. (Record, p. 141.)

Among other matters the appointment of a joint commission, a certain number of members of which was to be named by each synod, was authorized and directed to be incorporated under the name of "The Educational Commission of the co-operating synods (naming them) of the Cumberland Presbyterian church," the business of which was to have in hand the work of said synods in raising the proposed endowment as well as other necessary funds and property

for establishing said college and putting the same in successful operation, it being required of said commission to submit a joint report to the respective synods of their plan and proposed action for approval or rejection by those bodies. (Record, pp. 141-44.)

The authority of this Commission was clearly set out, as well also its duties and general plan of procedure. It was authorized to solicit, receive and hold in trust for the synods, contributions in money and property for the endowment and establishment of the college, and was to be responsible to the synods therefor. It was required to make annual reports of all its proceedings and operations and of the moneys and properties and on hand, to each of the synods. (Record, pp. 141-44.)

It should continue, unless otherwise ordered by the synods, until the permanent endowment fund of $100,000.00 should be raised; upon the completion of such fund, notice to the respective synods was required; and such synods were required, thereupon, to elect a board of Trustees for said college, the members of which should hold their positions subject to the pleasure and orders of such synods. It was further required of such synods to procure a suitable charter for said college. (Record, pp. 141-44.)

It was further provided by said resolutions, that upon the completion of said fund of $100,000.00 the said commission should proceed to

advertise for bids to secure the location of said college, and upon the reception of such bids, should secure the sums bid and the conveyances of real estate offered, locate and name such college, turn over to the Board of Trustees named by the synods all papers, funds and assets whatsovere collected by them, together with all books and papers touching its proceedings, and that immediately thereupon it should cease for all purposes contemplated. (Record, p. 141-2.)

It was further provided by said resolutions, that said joint commission and its successors, including the Board of Trustees for said college, should annually make full report of all its transactions and of the conditions of the fund to the respective synods of the fund to the respective synods. That said synods when appointing the first Board of Trustees, should also appoint the time and place of its meeting, and that said Board should at such time and place meet and organize and elect officers, including a treasurer. That such Board should have the control and management of the grounds, building, moneys and effects of all kinds of said institution, its finances and operations, and upon the qualification of its treasurer, should demand and receive of the Educational Commission provided for all moneys, properties, books, papers and other things in its hands or received by it. It was also provided that said Board of Trustees should control and manage said funds and make full report of its proceedings and of all things pertaining to said institution and its manage-

ment and control, and of the condition of its finances, to each meeting of each respective synod. (Record, pp. 141-44.)

It was further provided by said resolutions that the said $100,000.00, to be raised for the endowment as aforesaid, should, together with all such sums as might thereafter be added, be forever held inviolate for such purpose, and that neither the Educational Commission, nor the Board of Trustees should have any power to mortgage, pledge or use the same, for any purpose whatsoever, different from that for which it was contributed or raised. (Record, pp. 141-144.)

The joint commission authorized by said resolutions, was duly appointed by said synods, and held its first meeting at Sarcoxie, Missouri, on the 27th and 28th, days of October, 1874, and adopted a plan of endowment and operation in conformity with the resolutions of the synods. The first clause of the plan provided:

> "That a permanent fund of not less than $100,000.00, for the permanent endowment of an institution of learning to be under the joint control and ownership of the McAdow, Missouri, Ozark and Missouri Valley synods of the Cumberland Presbyterian church * * * be raised by contributions in the manner hereinafter, provided." (Record, pp. 157.)

The fourth clause provided:

> "In raising the $100,000.00, the commis-

sion looks to the pastors and officers of each congregation to present this interest to their people and to take from them the best contribution possible and forward the same through their treasurer to the President of the Educational Commission * * * whose duty it shall be to monthly pay over all moneys coming into his hands to the treasurer of the commission." Record, p. 158.)

The remaining clauses acknowledged the trusteeship of the commission, the control and ownership of the synods, and also provided in substance the same matters, as hereinbefore stated were embodied in the resolutions of the synods. (Record, pp. 157-161.)

The commission undertook the work mapped out and planned and later, as representatives of the synods, organized into a corporate body, with the said plan of endowment as approved by the synods as its charter, and made annual reports of its work and progress to the respective synods. (Record, pp. 153, 161-168.)

About the year of 1887, the commission reported that the permanent fund of $100,000.00 for the edowment had been secured, and that a suitable site and campus of about 39 acres at Marshall, Missouri, together with a sufficient sum of money in addition thereto, to build, erect and equip all necessary and convenient buildings for the operation of said school had been donated and secured, and that said commission had lo-

cated said school at Marshall, Missouri, and had named it Missouri Valley College. (Record, pp. 169-179.)

A large portion of the permanent endowment fund of $100,000.00, was raised throughout the synods, and a large portion was raised and contributed by the citizens of Marshall and vicinity, while the 39 acres for a site and campus, and the money for erecting the college building thereon, were contributed wholly by the citizens of Marshall and vicinity. (Record, pp. 172-179.)

The contract for the donation of said money and for the campus tract or site on the part of the citizens of Marshall, was made by representatives of the city of Marshall and vicinity, and by the Educational Commission representing the interested synods, and was in consideration of the location and maintainance by said synods of a school of the character mentioned, at said place. (Record, pp. 172-186.)

Upon notice from the Education Commission of the completion of said endowment, and of the securing of the other donations mentioned, and of the location and naming of said college, the synods of Missouri and of Kansas (being the synodical successors of the synods mentioned), elected a Board of Trustees for said college, and caused the same to be incorporated under the laws of the State of Missouri, with a charter intended to secure the permanent ownership, man-

agement and control of said college and all properties held by or for it, to the said synods, all as required by the original resolutions of the synods, the plan of endowment and the terms of the trust upon which said college was founded, and the donations of moneys and properties therefor, were made. Thereupon the Educational Commission caused the tract or lots of land donated by the citizens of Marshall, for a college site to be conveyed by James A. Gordon, in whose name the title had been placed as trustee, to the said Missouri Valley College, and caused to be turned into the hands of said Missouri Valley College for said synods, all moneys, properties, assets, books and papers received or held by them, for the establishment, endowment and maintenance of said school. The purposes and function of said Educational Commission, having thereupon, according to the terms of its creation ceased, the said Missouri Valley College, became its successor in said trust. (Record, pp. 176-186.)

CHARTER OF MISSOURI VALLEY COLLEGE.

(Found in Record, p. 164.)

The charter of said college was in conformity with the original resolutions of the synods, and provided for the incorporation of said trustees as representatives of the synods of Missouri and of Kansas of the Cumberland Church, and under the name of Missouri Valley College, with its chief office at Marshall, Missouri.

It provided also, that the terms of the trustees

should be for limited periods, designated therein, and until the appointment of their successors. That the synod of Missouri should have the appointment of ten trustees upon said Board and the synod of Kansas three, and that each synod should have the right to appoint successors from time to time, to the trustees elected by them, as their terms expired. That said Board should have the control and management of the affairs of the college and the possession and management of its property. It recited the purpose of said corporation to be to acquire the legal title to sufficient lands for the buildings of the association, with a suitable campus; to erect and maintain suitable college buildings; to receive and hold the permanent endowment fund from the Educational Commission, and to invest and preserve the same, and to collect interest thereon, and apply it to the use and operation of said college; to accept and hold all gifts, grants, devises, for the erection and maintenance of said college, its grounds, and for providing liberaries, museums, etc., in connection with the college; to accept gifts for the increase of the endowment, to be held and managed by it in like manner with the original endowment, and under the same limitations and for the same purposes. It provided the right of the Board to employ a Faculty, and to fix the salaries of each member thereof; to employ necessary workmen and fix the amount of entrance and tuition fees, but no right to mortgage or pledge any of the property of the association for any purpose whatever. It provided that said Board should

make report in writing to each of the interested synods at the respective annual meetings thereof, of the condition, prospects, and necessities and wants of the college, showing the number, age, sex, advancement, time and attendance of pupils for the collegiate year passed, and also a particular and detailed statement of all moneys received, from whom and on what account, with a like statement and account of all disbursements, and also a particular statement and account of the investment of said endowment fund, and of each and every fund under its management and control, with the proceeds and income of each. It further provided that the said trustees should keep all permanent funds invested, and should only have authority to apply profits therefrom, together with the income from tuition, fees, etc., to meet current expenses. It also provided that the endowment fund of the college, should not be held for any liability of the college.

It provided for the officers of the Board, the respective lengths of terms, the qualification therefor, and the duties of each. It provided the authority and duty of the Faculty, and gave to it the internal management of the college, the power to make and enforce rules for the government of students, their admission, suspension or rejection, and gave to it the charge of college instruction, its curriculum, classes, teachers, books, etc.

It provided also, that the charter of the college

might be amended; provided that such amendment should have the approval of the synods. (Record, pp. 164-168.)

The college buildings were erected upon the site or campus donated by the citizens of Marshall, with the money contributed by them and the members and friends of the Cumberland church, therefor; a Faculty was selected and placed in charge, and college opened in the year of 1889, under the control and ownership of the synod of Missouri and the synod of Kansas of the Cumberland church, and as a Cumberland Presbyterian college. (Record, pp. 169-179.)

The former Boards of Trustees were, with one or two exceptions, ardent Cumberlands, and annually made reports to the synods of Missouri and of Kansas of the Cumberland church, as required by the charter, the resolutions of the synods, and the plan of endowment, down until the year 1905. In said reports a complete report of all matters in detail regarding the condition, patronage, progress, needs, wants and necessities of the school were made, including a statement of the property, assets, income and expenditures, and any and all others matters pertaining to the same, for the information, judgment, orders and directions of said synods to be made with reference thereto, as the owners thereof, and as having the ultimate control thereof. (Record, pp. 455-456.) Said reports were annually examined and passed upon by said synods. (Record, p. 456.)

The synods, regularly elected or appointed the successors to all members of the Board of Trustees, as the terms for which they had been appointed expired; sought to correct such abuses as existed, if any, in their judgment, and to meet the necessities and wants of said institution in every respect from year to year. (Record, pp. 455-456.)

THE SYNOD OF KANSAS OF THE CUMBERLAND CHURCH DESTROYED.

The synod of Kansas was completely destroyed by the division, arising. It has not existed since the year of 1906. The class therein, which favored and approved the union, aligned itself with the synod of Kansas of the Presbyterian Church, while the class therein opposing and denying said union, went elsewhere or was reduced to such an extent, that it was unable longer to maintain the synodical organization, or even the organization of a sufficient number of presbyteries, required therefor, but abandoned all of the same. (Record, pp. 462-6.)

THE SYNOD OF MISSOURI OF THE CUMBERLAND CHURCH MAINTAINED.

In the synod of Missouri, the class denying the union and refusing to accept or recognize the same, maintained the organization of the original synod, as a Cumberland body, while the class favoring the union, organized into a synod of the Presbyterian Church. (For the action of the latter body, see Record, pp. 671-458. For

the action of the former class, see Record, pp. 485-490.)

It will be noted that under the laws and regulations of the Cumberland Church, as amended in the years of 1895 and 1896, the synod of Missouri, was a non-delegated body; that is, that all ministers and one elder from each congregation within its bounds, were entitled to sit and vote as members. (Record, pp. 320, 496-497.) Five ministers, who are members of one or more presbyteries composing the synod shall constitute a quorum for the transaction of synodical business, provided, there be present at least one minister on one ruling elder from each of the three presbyteries. (Sec. 36 Constitution; Record, p. 320.)

The Missouri synod, adjourned in 1905, to meet on the 16th day of October, 1906, at Louisiana, Missouri. (Record, p. 634.) It met pursuant to adjournment on the 16th of October, 1906, at Louisiana, Missouri, organized and transacted such business as came before it on such date, and adjourned its further session to Montrose, Missouri, where it continued and concluded its session on October 17th and 18th, 1906, and adjourned in the regular order. (Record, pp. 485-490.) A roll of its presbyteries is found at page 470 of the record, and among others embraced in 1905 and 1906, Lexington, McGee, New Lebanon, Ozark, Platte, Springfield, West plains and West Prairie (Record, pp. 485-490), representatives from each of

which participated in the meeting of 1906. (Record, pp. 485-490.)

A roll of the members present and of the presbyteries represented in such session in found in the Record, at pages 487-488.

The presbyterial connections of more than a sufficient number of those participating in the synodical session of 1906, than was required to constitute the same is found in the record, under offer 59, at pages 471-472. The same also appears from the rolls of the various presbyteries in force at the time of the alleged union in 1906, found in the record from pages 468-490.

The synod, has met annually, pursuant to previous adjournment, since 1906, and is being regularly maintained as the original synod of Missouri of the Cumberland Church. There is found in the record, from pages, 471-478, the respective opening orders, roll call of presbyteries, and members present with the respective adjourning orders, of each respective session for the years of 1907, 1908, 1909, 1910, 1911 and 1912, (the last previous session to the hearing in the court below.)

In 1912, it had enrolled 71 ministers, 7 licentiates, and 5 candidates for the ministry, representing 8 presbyteries. (Record, pp. 472-474.)

That the regular organization of more than the required number of presbyteries was also maintained is shown by the minutes of the vari-

ous presbyteries in the record, and by the minutes of the synod as well. (Record, pp. 468-488.)

Thus Lexington Presbytery is shown to have continued its regular organization, by offer 52, at page 468, and by offer 51, at the same page, that those participating in the perpetuation of the same, were properly connected therewith; and that the same was being maintained at the time of the filing of this suit. (Record, page 490, offer, 67b.)

The same is also true as to Platte presbytery, as shown by offer 55, at page 470, and offer 53, at page 469. And that the same was being maintained at the time of filing of the bill of complaint herein. (Record, 67b, p. 490.)

The same is also true with reference to New Lebanon presbytery, as shown by offer 58, at pages 470-471, and by offer 57 at page 470, and by offer 68, at page 487. And that the same was being maintained at the time the bill of complaint was filed. Record, 67f, page 482.)

The same is true with reference to Springfield presbytery, as shown by offer 64d at page 478 of the record, and by offer 64c at the same page. And that the same was being maintained at the time the bill of complaint, herein, was filed. (Record, 64d, page 480.)

The same is true with reference to Ozark

presbytery, as shown by offer 64j at page 484 of the record, and by offer 64i, at pages 483-484. And that the same was being maintained at the time the bill herein, was filed. Record, 64j, page 484.)

The synodical minutes also show the additional presbyteries of McGee, West Prairie and Iowa. (Record, pages 474-478; 487-488.)

It will be noted that under the laws of the Cumberland Church, any three ministers belonging to the presbytery being met at the time and place appointed shall be a quorum, competent to proceed to business. (Constitution, section 29, Record, p. 319.) Special meetings may also be called in the manner provided in section 33 of the Constitution. (Record, p. 319.)

At the time of the alleged union in 1906, the following named persons, all residents and citizens of the State of Missouri, were the lawful representatives of the synod of Missouri of the Cumberland Church on the Board of Trustees of Missouri Valley College, having been appointed thereto by said synod prior to the division arising out of said union, to-wit: E. D. Pearson, W. P. Stark, David F. Manning, Peter H. Rea, John C. Cobb, A. C. Stewart, W. T. Baird, George Ward, Ben Eli Guthrie and Luther Nickell. (Record,p. 456.)

They, however, it is claimed by defendants, had vacated their positions as members of said

Board, upon the promulgation of said union, by their acceptance and recognition of the same, and by their refusal to longer recognize the synod of Missouri of the Cumberland Church in the administration of the affairs of said college, and by their failure and refusal to longer make reports to said synod, and by their undertaking to repudiate the rights and claims of said synod in and to the property and affairs of said college, and by the denial of their trusteeship for said synod, and by their diversion of the affairs and property of said college to the use of the synod of Missouri of the Presbyterian Church, and their assertion that said college with its property and interests had become the property of the synod of Missouri of the Presbyterian Church and they the agents and trustees of said synod, and by their administration of the affairs of said college under the direction of said synod of the Presbyterian Church and the interest and behalf thereof (Record, pp. 455-457), and the said synod of Missouri, of the Cumberland Church, had at the time of filing of the bill of complaint herein, and long prior to such time, appointed as their successors upon said Board of Trustees, the following named persons, to-wit: J. W. Duvall, O. G.Dameron, C. H. Harrison, J. E. Eberts, B. F. Garst, G. P. Grimes, G. W. Freeman, T. C. Newman and William Hinton, likewise citizens and residents of the State of Missouri, and who at the time of the filing of the bill of complaint herein constituted the true and lawful representatives of the synod of Missouri of the Cumberland Church upon the

Board of Trustees for said college, and all of whom are defendants herein. (Record, p. 494.)

The said E. D. Pearson, W. P. Stark and others mentioned with them, however, refused to surrender their places upon said Board to the newly elected members, the said J. W. Duvall, O. G. Dameron, and others mentioned with them, but continued to claim and assert that they were the lawful members of said Board, and continued to exercise the functions of such members and in control of the corporate and property rights of said Missouri Valley College, and continued in the management of said institution and in possession of its property and affairs, and as the terms for which they had been originally appointed by the synod of Missouri of the Cumberland Church, expired(or would have expired by limitation, had they not sooner vacated their positions by their conduct and course, as is contended by defendants they had done) accepted new and pretended commissions from the synod of Missouri of the Presbyterian Church for additional terms, or others were pretended to be named by said synod of the Presbyterian church in their stead or as their successors upon said Board, and thus continued in charge of the affairs of said college and its property, claiming to be true and lawful members of said Board under said pretended commissions (Record, pp. 456-457), and at the time of the filing of the bill of complaint and the pleas and the answer herein, they were so in charge of the said college, its property and affairs, claiming to be law-

ful members of its Board of Trustees, and at said times were each and every one citizens and residents of the state of Missouri. (Record, pp. 456-457.)

Upon the appointment of the said J. W. Duvall, O. G. Dameron and others mentioned, defendants herein, to said Board by the synod of Missouri, a controversy at once arose between them and the said E. D. Pearson, W. P. Stark and others, claiming to be members, as to which of them constituted the true and lawful members of said Board, and as to which of them were entitled to the control and management or to participate in the control and management of said college, its property and affairs; which controversy found its way into the Circuit Court of Saline County, Missouri, the county in which said property and home office is situated, in a suit by the said J. W. Duvall, O. G. Dameron and others, as members of said Board and as representatives of said synod of Missouri of the Cumberland Church, against the said E. D. Pearson, W. P. Stark and others, claiming to be members of said Board, and representatives of the synod of Missouri of the Presbyterian Church, thereon, and others claiming by appointment under them to be the officers of said Board and the Faculty of said college, and which said suit was pending and undetermined at the time of the filing of the bill of complaint herein, and is now pending on appeal in the Supreme Court of the State of Missouri.

The petition, answer and reply in said cause are found at pages 498-510 of the record.

All the evidence as to the history of the Cumberland Church, its constitution, laws, creed and doctrines, and all the evidence as to the proceedings of both the Presbyterian Church and the Cumberland Church, and of their respective general assemblies, synods and presbyteries, which led up to and eventuated in the alleged merger of the two churches, introduced in the general Church Case, as hereinbefore shown by the statement of the evidence in that case, was also introduced in this case.

The charter of the complainant, the synod of Kansas of the Presbyterian Church in the United States of America, was also in evidence. (Rec., pp. 267-9.) From this it appears that the corporation was created in September, 1909, shortly before the institution of this action.

Certain documents, relating to the constitution of the Executive Commission, and resolutions of the Commission, regarding litigation in Missouri, were produced in evidence. (Rec. pp. 269-73.)

There was a stipulation as to the relation to the controversy of the different persons, parties to the suit, and also of other persons, not parties, claimed by the defendants to be indispensable parties to the litigation. (Rec., pp. 456-7.)

The record in the case of *Boyles et al.* v. *Rob-*

erts, with the opinion of the Supreme Court of Missouri in that case, referred to in the statement of the General Church case, also in evidence in this case.

Decree for the complainants was rendered and entered December 15, 1913. (Rec., p. 672.)

It decreed the alleged union to be valid and binding upon all classes of persons represented by the personal plaintiffs who affirmed the validity of the union, as well as upon the corporate plaintiff, the synod of Kansas of the Presbyterian Church, and upon all classes of persons represented by the personal defendants who denied such validity, as well as upon the corporate defendant, Missouri Valley College; it held that the personal plaintiffs were proper representatives of the class which affirmed the validity of the union, and that the personal defendants were proper representatives of that class which denied the validity thereof.

That by the alleged union the Kansas synod of the Cumberland Presbyterian Church and the Kansas synod of the Presbyterian Church in the United States of America were united into the Kansas synod of the Presbyterian Church in the United States of America, and the Kansas synod of said United Church was, in pursurance of the union, and still was the owner and successor of all the rights, franchises and interests in and to all the property and endowments, real and personal, held in trust by the defendant corporation, the Missouri Valley College, for the

former Kansas synod of the Cumberland Presbyterian Church and is entitled to all the use and control of all said property formerly belonging to the Kansas synod of the Cumberland Presbyterian Church, the title to which was, as against the personal defendants and those represented by them, forever quieted.

The personal defendants and those represented by them were decreed to have no interest in the property and they and their agents and representatives were enjoined from using or controlling, or attempting to use or control any of the property held by the corporate defendant, Missouri Valley College; that said property was held by said corporation for the use of the Presbyterian Church in the United States of America, and said corporation was enjoined by the decree to use and permit the use and control of the property by and for the United Church and its subordinate divisions.

The appeal of the defendants to the United States Circuit Court of Appeals was allowed June 5, 1914. (Record, p. 684.)

STATEMENT OF QUESTIONS AND ISSUES INVOLVED.

So it will be seen that the general questions involved in these suits are:

1. Whether or not the alleged union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian

Church, but in fact an attempted merger of the Cumberland Presbyterian Church into the Presbyterian Church in the United States of America was legal and valid.

2. Whether or not, as a result of such alleged union, or merger, certain property owned or controlled by the Cumberland Presbyterian Church, or its congregations, passes by operation of law into the Presbyterian Church in the United States of America.

Involved in the first general question, the following issues, stated interrogatively, must be considered and determined in this suit:

1st. Were the General Assembly and Presbyteries of the Cumberland Presbyterian Church, by and under any provision or provisions of the constitution of said Church, vested with the power to form the alleged union or merger.

2nd. If said judicatories had such constitutional power, was it exercised, in forming said alleged union or merger, in mode and manner prescribed by the constitution? In other words, was the basis of union constitutionally submitted or adopted?

3rd. Property rights being involved, is this Honorable Court precluded from inquiring into the validity of said alleged union or merger by the action of the General Assembly of the Cumberland Presbyterian Church declaring that the union had been constitutionally

agreed to by said church, and that the basis of union had been constitutionally adopted?

4th. Did the General Assembly of the Cumberland Presbyterian Church, or said General Assembly and Presbyteries by concurrent action, in the absence of constitutional authority, have the inherent right and power to form said alleged union, or merge the Cumberland Presbyterian Church into the Presbyterian Church in the United States of America?

Other Questions Involved.

3. Whether the complainants, or either of them, have such relation to or intreest in the property involved, as to entitle them to institute this suit.

4. Whether the action should have been allowed to proceed in the absence of persons asserted by the defendants to be indispensable parties to the suit.

5. Whether the court should have proceeded to any decree in the cause, in view of the fact that before the bill of complaint in this action was filed the trustees of the Missouri Valley College, elected such by the proper authorities of the Cumberland Church (defendants herein), had brought suit in the Circuit Court of Saline County, Missouri, for the possession of the college property, against persons in possession of it as trustees, appointed as such by the authorities of the Presbyterian Church, in which action in the State court was involved the same

controversy and dispute as are involved in this action, which said action in the state court was and still is pending.

6. Whether or not, as the result of said alleged union or merger, the right to the possession, management, and control of the property of the Missouri Valley College, then enjoyed by certain of the defendants and others, as trustees appointed by the authorities of the Cumberland Church, passed, by operation of law, to the persons (named in the answer) now in the possession of the college property, managing and controlling the same, and claiming to do so as trustees appointed by the authorities of the Presbyterian Church.

Each of these questions was raised by the pleadings.

SPECIFICATION OF ERRORS:

The Circuit Court of Appeals erred:

1. In affirming the decree of the District Court.

2. In not reversing the decree of the District Court and remanding the cause with direction to dismiss the bills.

3. In refusing to consider or decide the issues pleaded as to the title of the properties involved under the trusts, under which said properties are held in trust for the beneficial enjoyment of

Appellants and in following the decision of the church judicatories without determining the merits of the said issues and in affirming the decree of the District Court depriving Appellants of the enjoyment of said properties, whereby Appellants are deprived of their property without due process of law, they are denied the equal protection of the law and their privileges and immunities as citizens of the United States are abridged contrary to the guaranties of the Constitution of the United States.

4. In affirming the decree of the District Court depriving Appellants of the enjoyment of property involved in the suit and held by their trustees in trust for their beneficial enjoyment, whereby they are deprived of their said property without due process of law and are deprived of the equal protection of the law in violation of the Constitution of the United States.

The Circuit Court of Appeals also erred in affirming the action of the District Court:

5. In finding the issues in favor of Appellees.

6. In adjudging and decreeing that the union of the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America was lawful and valid, and resulted in the formation of the United Church under the name of the Presbyterian Church in the United States of America.

7. In adjudging and decreeing that said al-

leged united church possesses all the legal and corporate rights possessed before said alleged union by each of said former churches.

8. In adjusting and decreeing that said alleged union is binding upon the classes of persons represented by the personal plaintiffs who affirm the validity of such union and that it is also binding upon the corporate plaintiffs, the Synod of Kansas of the Presbyterian Church in the United States of America, and that it is binding upon all classes of persons represented by the personal defendants who deny such validity, and that it is binding upon the corporate defendant, Missouri Valley College.

9. In adjudging and decreeing that the personal complainants are proper representatives of the class which affirm the validity of the union and that the personal defendants are proper representatives of the class which deny the validity thereof.

10. In adjudging and decreeing that the alleged union of 1906 the Kansas Synod of the Cumberland Presbyterian Church and the Kansas Synod of the Presbyterian Church in the United States of America were united into the Kansas Synod of the Presbyterian Church in the United States of America; that the Kansas Synod of said alleged united church was by and in pursurance of said act of union made and now is the owner and successor to all the rights, franchises and interests in and to all the property

and endowment, real and personal, held in trust by the defendant corporation Missouri Valley College for the former Kansas Synod of the Cumberland Presbyerian Church and that it, the Kansas Synod of the Presbyterian Church in the United States of America, is entitled to all the use and control of said property formerly belonging to the Kansas Synod of the Cumberland Presbyterian Church by and under the charter of said corporate defendant.

11. In adjudging and decreeing the title to said rights, franchises, interests, property and endowments, real and personal, quieted in said Kansas Synod of the Presbyterian Church in the United States of America as against the personal defendants and those represented by them.

12. In adjudging and decreeing that the personal defendants, their agents and employees as well as those represented by said defendants have no interest in the property mentioned in the bill of complaint.

13. In adjudging and decreeing that the defendants and each of them, their agents and employees and those represented by them be enjoined from using and controlling and attempting to use or control any of the properties held in trust by the corporate defendants, the Missouri Valley College and that they be enjoined from using and permitting the use and control of such properties of every kind and character, including personalty and surety records, by and for said alleged united church and subordinate di-

visions thereof as is provided in said act of union respecting the franchises to said property formerly belonging to the Cumberland Presbyterian Church and the respective subdivisions thereof.

14. In adjudging and decreeing that the property mentioned in the bill of complaint is held by the corporate defendant, the Missouri Valley College, for the use of the Presbyterian Church in the United States of America.

15. In adjudging and decreeing that the personal defendant should pay the costs of this suit.

16. In not adjudging and decreeing by its decree that no merger and union of two churches had been accomplished, and erred in not adjudging and decreeing that for that reason the complainant's bill of complaint and the amendments thereto should be dismissed.

17. In overruling the plea of the defendants to the bill of complaint and the amendments thereto, which plea named certain persons and averred them to be necessary and indispensable parties to the suit, and erred in refusing to make the persons so named or any of them parties to the suit, before any further proceedings were had and made therein.

18. In adjudging and decreeing that said alleged united church and the complainants and those alleged to be represented by them for it, are entitled to all or any of the property describ-

ed in the bill of complaint and the amendments thereto.

19. In adjudging and decreeing the title to said properties quieted into and in said alleged united church and that said title is free of all right, title or claim of the defendants, or those represented by them who deny the validity of said alleged union.

20. In adjudging and decreeing that the defendants and each of them, their agents, employees and represented by them, be enjoined from using or permitting to be used any of such church property for the benefit of any person, persons, congregation, church or association who or which does not recognize the validity of said alleged union, and in enjoining them from using and permitting to be used property by and for said alleged united church.

21. In not adjudging and decreeing that the bill of complaint be dismissed for the reason that neither of the complainants possessed any such relation to or interest in the property, either as individuals or as officials or representatives of persons or a class of persons who did possess such an interest in the properties as entitled them or either of them to institute or maintain this action.

22. In adjudging and decreeing that said alleged united church and the complainant and those represented by him for it were entitled to

the property in Henry County, Missouri, described as follows: One-half acre, commencing at a point 208 1-3 feet due north of the southeast corner of Section 10, Township 49, Range 46; thence north 208 1-3 feet; west 208 1-3 feet; south 208 1-3 feet; east 208 1-3 feet to the beginning, known as the Mt. Carmel Cumberland Presbyterian Church property described in the deed recorded in Book 84 at page 17 in the office of the Recorder of Deeds for said Henry County; and in not adjudging and decreeing that the decree rendered by the Circuit Court of Henry County, State of Missouri, on the 5th day of November, 1909, in a proceeding which involved the title to said property and the same controversy raised in this suit was resjudicata and to be regarded as such. It erred in not adjuding and decreeing that the bill of complaint as to said property and as to the defendant, James G. Turk, be dismissed.

The Circuit Court of Appeals erred in affirming the decree of the District Court in which decree are the following errors:

23 The defendants averred that neither the corporate complainant nor any of the individual nor any persons or corporations whom said individual complainants assert they represented, or any of them, have any such interest, legal or equitable, in the property of the Missouri Valley College described in the bill of complaint as entitles them or either of them to institute or maintain this action; and the District

Court erred in not so adjudging and decreeing and in not dismissing the bill of complaint for that reason and in adjudging and decreeing that the complainants had any such interests and in rendering a decree in their favor.

24. The defendants averred that all the property described in the bill of complaint belongs to the Missouri Synod of the Cumberland Presbyterian Church and is, and should be held by the Missouri Valley College in trust for the Missouri Synod of the Cumberland Presbyterian Church and the District Court erred in not so adjudging and decreeing and for that reason dismissing the bill of complaint.

25. The Synod of Kansas of the Presbyterian Church in the United States of America, the corporate complainant, has, and can have by its charter no interest whatever, legal or equitable, in the property in controversy or in any schools, colleges or educational institutions outside of the State of Kansas or even any power or supervision over the religious or educational affairs of Presbyterian Churches or schools or colleges outside of the State of Kansas and the court erred in not so adjudging and decreeing and for that reason dismissing the bill of said corporate complainant.

26. The defendants, other than the Missouri Valley College, are the lawful members of the Board of Trustees of the College and as such entitled to the possession, management and con-

trol of the property described in the bill and whose title is vested in the corporate defendant and the court erred in not so adjudging and decreeing and in not dismissing the bill of complaint for that reason.

27. The defendants averred that said alleged union and merger was invalid and without legal effect and that the equitable and beneficial title to the property involved in this controversy after said alleged merger and union remained vested in the Missouri Synod of the Cumberland Presbyerian Church and that the right to possession, management and control thereof was, after said alleged merger and union, vested in the individual defendants Duvall, Harrison, Eberts, Freeman, Garse, Newman, Hinton, Grime and Dameron, as members of the Board of Trustees of said Missouri Valley College, they having been so appointed by the said Missouri Synod of the Cumberland Presbyterian Church in pursuance of the provisions of the charter of said corporate defendant; and that by said alleged merger and union, no title, equitable or beneficial and no right to the possession, use, control and management thereof, passed to or vested in the Kansas Synod of the Presbyterian Church in the United States of America or in any of its agents, officers or appointees; and the court erred in not so adjudging and decreeing by its decree and for that reason dismissing the bill of complaint.

28. The defendants averred that the bodies and

judicatories of the Cumberland Presbyterian Church which voted in favor of said alleged merger and union had no power under the Constitution and laws of the Cumberland Presbyterian Church to take any action which would have the results of merging and uniting the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America; the action by said bodies and judicatories as a result of which a merger and union of the two churches is asserted was null and void and without binding effect upon any of the organizations or membership of the Cumberland Presbyterian Church; the court erred in not so finding adjudging and decreeing and for that reason dismissing the bill of complaint and the amendments thereto.

29. By order of court made at the time of the overruling of defendant's plea that certain named persons were indispensable parties to the suit, defendants were given leave to set up in their answer the same or similar matters which, they did set up and that the same persons mentioned in their said plea were necessary and indispensable parties to the suit and the court erred in refusing to make such persons or any of them parties to the suit and erred in proceeding to a decree without having ordered that said person or any of them be made parties.

30. The defendants averred that the adoption of the so-called plan of union through the passage of what is known as the Templeton Reso-

lution in May, 1904, was brought about by fraudulent methods and for that reason the action then taken in that regard was null and void and the court erred in not so adjudging and decreeing and for that reason dismissing the bill of complaint.

31. These defendants averred that neither of the complainants either as an individual or as an officer of the Presbyterian Church in the United States of America or as a representative of the members of the said Presbyterian Church in the United States of America has, nor has the said James M. Barkley, complainant, as moderator of the general assembly or chairman of the executive commission of the general assembly of the Presbyterian Church in the United States of America, nor has the said William H. Roberts, as stated clerk of the general assembly or as secretary of the executive commission of the general assembly of the Presbyterian Church in the United States of America any such interest in any of the property involved in this suit, real or personal, or in the matter in controversy herein, as entitles him to maintain this or any other action relating to the title to any of said property of the possession thereof; and the court should so have adjudged and decreed and the court erred in not so adjudging and decreeing and also in decreeing that they and each of them did possess such interest.

32. The defendants averred that this suit was not brought by the complainants on behalf of any

other members of the Presbyterian Church and that they had no right to bring the same on behalf of such other members; that they are in no sense representative of any persons or class of persons possessing such an interest in any of the property involved in this suit as would entitle such persons or class of persons to invoke the aid of a court of equity for the protection of their interests in such property; and that the court erred in not so adjudging and decreeing and in decreeing that the complainants were such representatives and as such entitled to maintain this action.

33. The defendants averred that the title to the several properties described in the bill of complaint and its amendments and the answers thereto was vested in the persons or associations or organizations mentioned in the instrument which conveyed them, or created them, or under which they were held, as fully set forth in the answer; in each case the persons or classes of persons or organizations, purely local in the State of Missouri, possess the legal, equitable and beneficial interest therein; that no part of it belonged to the entire membership of the Cumberland Presbyterian Church or to the general assembly of that church, nor did such entire membership nor said general assembly have any interest therein, legal, equitable or beneficial; and the court erred in so adjudging and decreeing that such property belonged to the entire membership of the church in the United States.

34. The defendants averred that the bodies

and judicatories of the Cumberland Presbyterian Church which voted in favor of said alleged merger and union had no power under the constitution and laws of the Cumberland Presbyterian Church to take any action which should have the result of merging and uniting the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America; that the action by said bodies and judicatories as a result of which a merger and union of the two churches is assorted was null and void and without binding effect upon any of the organizations or membership of the Cumberland Presbyterian Church; and that the court erred in not so finding, adjudging and decreeing and for that reason dismissing the bill of complaint and the amendments thereto.

35. The bill of complaint and its amendments were multifarious; there was no proof whatever in the case of any conspiracy between the defendants or any of them as alleged in the bill; in the absence of such proof, the court erred in rendering any decree in favor of the plaintiffs and against the defendants upon the bill of complaint so manifestly multifarious.

POINT AND AUTHORITIES.

I.

The alleged contract of union and reunion was in fact a scheme of merger of the Cumberland Church with its membership, organization and property into the Presbyterian Church, and contemplated the utter destruction of its identity as a separate organization, and was void.

Associate Reform Church v. Trustees of Theological Seminary, 4th N. J. Equity, p. 77.
Landrith v. Hudgins, 121 Tenn. 597-600.
Apeal cases 1904 p. 695.
Boyles v. Roberts, 222 Mo. 612.

(a) The General Assembly of the Cumberland Church could do no act that might destroy the existence of the church or injure its privileges, except and alone, as authorized by the consent of the entire church, including the membership, as evidenced in and authorized by the constitution of the church.

Associate Reform Church v. Trustees Theological Seminary, 4 N. J. Equity 77.

(b) The effect of the action of the General Assembly of the Cumberland Church, in undertaking to enter into and promulgate the alleged contract of union, was to destroy the church it was appointed to preserve, and to abrogate the doctrines it was appointed to maintain; this it could not do.

Enc. Law & Procedure, 4th Vol. p. 315.
Burk v. Roper, 79th Ala. 138.

II.

The enforced merger of the membership into and with the Presbyterian Church is a violation of the law of the land and void. The matter of church affiliation and membership is and must be a purely personal and voluntary matter.

There existed no authority in the General Assembly of the Cumberland Church to transfer the ministry and membership of that church to the ministry and membership of the Presbyterian Church.

Konta v. Stock Exchange, 189 Mo. 261
Boyles v. Roberts, 222 Mo. 691-2.

III.

Constitutional authority must be shown by those asserting it.

Kerr's Apeal, 89 p. 97
Schnorr's Appeal, 67 Pa. 138.
Gartin v. Penick, 5 Bush, 110, also Mr. Redfield's note of the same case;
9th Am. L. Reg. N. S. 210-221;
Chase v. Cheeney, 10 Am. L. Reg. N. S. and Mr. Fuller's notes of the same case, p. 308;
Bear v. Heasley, 98 Mich.
Free Church of Scotland case;
Appeal cases, 1904, p. 612;
Boyles v. Roberts, 222 Mo. l. c. 655.

IV.

The scheme is null and void because not authorized by the constitution of the Cumberland Presbyterian Church. It is not only not authorized thereby, but it is in conflict therewith, and in open defiance and subversion thereof.

Boyles v. Roberts, 222 Mo. p. 677;
Watson v. Avery, 2nd Bush, p. 332;
Bear v. Heasley, 98 Mich, p. 279;

Bunn v. Gorgas, 41 Pa. St. 446;
Krecker v. Shirley, 163 Pa. St. 534.
Miller Constitutional Law p. 71;
State v. Ah Chuey 14 Nevada, p. 79;
Cooley on Constitutional Lim. p. 41.
Kemper v. Hawkins, 1st Vir. cases 20-24
French v. State, 52 Mass. p. 759-762.
Cooley's Constitutional Lim. p. 3.
Enc. Law. vol. 8 p. 715.
Citizens Saving and Loan Association v. Topeka, 20 Wall, 665.
McCulloch v. State of Maryland, 4 Wheaton, 405.

(a) The alleged scheme is not only not authorized by the constitution, but is in conflict therewith and prohibited thereby, and is in open defiance and in subversion thereof.

Page v. Allen, 58 Pa. St. 338;
People v. Draper, 15 N. Y., p. 543;
Lynn v. Polk, 8 Lea. p. 169;
Norment v. Smith, 5 Yerg. p. 272;
Boyles v. Roberts, 222 Mo. pp. 683-4.

(b) The history of the constitution shows its purpose to be to prohibit such a scheme as the one involved.

V.

Unconstitutionality further considered. The government of the Cumberland Church is representative in character. The General Assembly and other church courts are not the church. They are but constitutional agencies of the

church. They do not possess the power of sovereignity, but only such powers as are granted them under the constitution. The sovereignity of the church is in the people, that is the membership at large-official and non-official and ministerial, and the basic unit thereof is the local congregation or particular church, as it is termed in the constitution.

Cooley's Const. Lim. p. 37.

(a) There is no inherent authority for the scheme.

(b) The scheme is not within the domain of legistrative, judicial and executive powers.

Cooley's Const. Lim. p. 41.
Boyles v. Roberts, 222 Mo. p. 692;
McCulloch v. Maryland, 4 Wheaton, 421.
Calder v. Bull, 3 Dallas, p. 387.

(c) The scheme and question is not within the amendatory power of the General Assembly of the Cumberland Church.

Russie v. Brazzelle, 128 Mo. l. c. 115;
Boyles v. Roberts, 222 Mo. 613, l. c. 692.

(d) The complainants' claim that the four specific steps taken were sufficient, is untenable.
Russie v. Brazzelle, 128 Mo., 107-8;

Prohibitory Amendment cases 24 Kansas, 706;

Boyles v. Roberts, 222 Mo. 613, l. c. 684;
Bear v. Heasley, 98 Mich. 279;
Schlichter v. Keiter, 156 Pa. St. 119.
Konta v. Exchange 189 Mo. 26.

(e) The local congregations within the Cumberland Church cannot be merged the one into the other without the consent of the membership.

Story Constitution, Section 362.
McCulloch v. State of Md. 4 Wheaton, 403.

VI.

The laws of the Cumberland Presbyterian Church and the powers of its General Assembly thereunder are not the same as the laws of the Presbyterian Church, U. S. A., and other Presbyterian Church bodies.

VII.

Even if the scheme and the alleged contract herein contemplated and involved could properly come within the amendatory powers of the General Assembly, still no amendment was ever made to the constitution of the Cumberland Church authorizing it, and the entire scheme was taken up and attempted to be put through, while the constitution prohibited such action upon the part of the General Assembly. There was no authority in the General Assembly to undertake the Negotiations involved and no authority to entertain OR SUBMIT SUCH A PROPOSITION, BUT ON THE CONTRARY, IT WAS PROHIBITED THEREFROM.

Boyles v. Roberts, 222 Mo. 613. l. c. 681.

VIII.

The adoption of the plan of union as reported by the Joint Committee, and the submission of the basis of union as therein provided to the presbyteries, and the action of the presbyteries thereon, did not effectuate an amendment of the constitution of the Cumberland Church and thereby authorize the merger of that church into the Presbyterian Church in the United States of America.

Prohibitory amendment cases, 24 Kansas, 709;
In re Constitutional Convention, 14 R. I. 651;
Boyles v. Roberts, 222 Mo., 613;
Landrith v. *Hudgins*, 121 Tenn. 680.
Smith v. Stephens, 10 Wall, 326;
Bunn v. Gorgas, 41 Pa. 446;
White v. Brownell, 2 Daily, 329;
Bear v. Heasley, 98 Mich, 279;
Lamm v. Cane, 14 L. R. A., 538;
Philomath v. Wyatt, 26 L. R. A., 78;
Russie v. Brazzelle, 128 Mo. l. c. 107;

IX.

The scheme and alleged contract are void and of no effect, also, because the entire plan was not submitted to the Presbyteries.

Westminster Pres. Ch. v. Trustees, 211 N. Y. 214.
Boyles v. Roberts, 222 Mo. 613, l. c. 680.

X.

The action of the majority of the Commission-

ers in the General Assembly, in entertaining the scheme of merger and in undertaking to declare it finally effective and operative, and in declaring the General Assembly adjourned *sine die* without naming the time and place for the next meeting, was in excess of their authority and void.

Appeal Cases Law Rep., 1904, p. 687.
Aurecher v. Yerger, 90 Iowa, 558;
Kreuher v. Shirley., 163 Pa., 534.

XI.

The minority of the Commissioners in the Assembly of 1906 acted in accordance with their commissions, and with the law of the Church, and in so doing perpetuated the existence of the Cumberland Presbyterian Church and preserved its organization intact.

Enc. law and Procedure, 4 Vol. 315;
Burk v. Roper, Ala., 138;
White v. Brownell, 3 Abb. P. R. N. S. (N. Y.) 318;
Thomas v. Ellmaker, 1 Pars. Eq. cases, (Pa.) 98;
Kenny v. New England Protective Association, 37 Vermont, 64.
Troy Iron Factory v. Corning, 45 Barb. (N. Y.) 231;
Schiller Commandery v. Jennichen, 116 Mich., 129;
St. Mary's Benevolent Association, 64 New Hamp. 213.
Enc. Law and Procedure, 4 Vol. p. 315-316.

Burke v. Roper, 79 Ala. 138.
Butterfield v. Beardsley, 28 Mich. 412;
Grand Lodge K. P. v. Germania Lodge, 56 N. J. Equity, 63.
Koehler v. Brown, Daly (N. Y.) 78;
Abels v. McKeen, 18 N. J. Equity, 462.

XII.

To construe and pass upon the meaning of the constitution of the Church is not an ecclesiastical but a civil question. The constitutions of ecclesiastical bodies are civil contracts between the members thereof, and passing upon questions of property rights, arising out of the violation of its terms, civil courts apply those established rules that govern in other civil controversies.

Bear v. Heasley , 98 Michigan, 279;
Boyles v. Roberts, 222 Mo. l. c. 677;
Watson v. Avery, 2 Bush, 332;
Bunn v. Gorgas, 41 Pa. 446;
Krecher v. Shirley, 163 Pa. St. 534;
Gartin v. Penick, 5 Bush, 110;
Deaderick v. Lampson, 11 Heisk, 523;
Presbyterian Church v. Wilson, 14 Bush, 278;
Hyder v. Woods, 2 Sawy., 655, 94 U. S. 523;
White v. Brownell, 2 Daly, 239.

XIII.

No contrary contemporaneous construction.

XIV.

If there was no other infirmity in the scheme, the same would nevertheless be void, for the reason, that the doctrine and polity of the two

churches are not the same and the one cannot be merged into the other, without violating the trust upon which the same was acquired and held under the law of the land.

(a) Differences in doctrine.

Boyles v. Roberts, 222 Mo. 613, l. c. 655, 666;
Landrith v. Hudgins, 121 Tennessee, 626-629;
Free Church of Scotland Cases, Law Reports Appeal cases, 1904, 669.
Roschi's Appeal, 69 Pa., 462;
Harper v. Strauss, 14 B. Monroe, 48;
Gartin v. Watson, 41 Pa. 13;
Schnorr's Appeal, 67 Pa. 138;
Smith v. Pedigo, 45 Ind. 361;

(b) There was no finding by the General Assembly that the doctrines and polity of the two churches are the same.

Boyles v. Roberts, 222 Mo. l. c. 656;
Landrith v. Hudgins, 121 Tenn. 626;
L. R. Appeal cases, 1904, p. 669.

(c) Examinations of doctrines and creeds as well as of the laws of the two churches reveal material differences in many respects.

Blake's Old Log House, 75
Preface Confession of Faith and Government, 1 and 2, Rec. 253-255.

(d) Calvinism a complete and compact system.

(e) Medium system of theology stated.

(f) Ordo Salutis.

(g) Brief Statement.

(h) Doctrines never declared identical by the two churches.

Landrith v. Hudgins, 121 Tenn. 626-629.
222 Mo. 657-8, 661-6.
Appeal Cases, 1904, p. 669.

(i) Polity Different.

XV.

Civil courts will consider differences in doctrine to determine the validity or invalidity of the proposed union and the ownership of property.

Appeal Cases, 1904, pp. 627-8.
Appeal Cases, 1904, pp. 515-6.

XVI.

General Assembly's action not judicial, and if it were, not binding as to civil rights.

Cooley's Const. Lim. 109-111;
Philomath College v. Wyatt, 27 Or. 390.

XVII.

Ecclesiastical decisions not conclusive when civil rights are involved. Civil courts decide civil rights for themselves. Ecclesiastical decisions have no effect, when in subversion of the laws of the society, or when, to give the same effect, the result will be to accomplish that which is inconsistent with or prohibited by the laws of the land.

XVIII.

Ecclesiastical courts may decide for them-

selves conclusively questions of discipline, and other purely ecclesiastical matters; but is doing so they must observe the customs, usages and laws of the particular church. They cannot decide civil rights at all, nor by their decisions as to ecclesiastical matters affect civil rights in such a way as to preclude civil courts from considering the adjudging for themselves whether or not the ecclesiastical rulings were made in accordance with such customs, usages, and laws. Church courts, like civil courts, are bound by the laws, through which and under which they exist and perform their respective functions.

Hatfield v. Long, 156 Ind. 209;
Smith v. Pedigo, 145 Ind. 361;
O'Donovan v. Chatard, 97 Ind. 423;
Grimes v. Harmon, 35 Ind. 201-254;
Bouldin v. Alexander, 15 Wallace, 131;
Perry v. Wheeler, 12 Bush, 541;
Lemp v. Raven, 113 Mich. 375;
Krecker v. Shirey, 163 Pa. 534;
Prickett v. Wells, 117 Mo. 502;
Pounder v. Ash, 36 Neb. 564;
Bird v. St. Mark's Church, 62 Iowa, 567;
Kerr's Appeal, 89 Pa. 97;
Jennings v. Scarborough, 56 N. J. Law 401;
Smith v. Nelson, 18 Vt. 511;
Baptist Church v. Jones, 79 Miss. 488-582;
Bear v. Heasley, 98 Mich. 279;
Bridges v. Wilson, 11 Heisk, 458;
Deaderick v. Lampson, 11 Heisk, 523;
Nance v. Busby, 91 Tenn. 304;
Travers v. Abby, 104 Tenn. 665;
Roberts v. Bunett, 108 Tenn. 173;

Watson v. Garvin, 54 Mo. 377;
Ferravia v. Vasconcell, 31 Ill. 35;
Watson v. Avery, 2 Bush, 332;
Associate Reform Church v. Trustees, 4 N. J. Ch. R. 77;
Gartin v. Penick, 5 Bush, 110;
McFadden v. Murphy, 149 Miss. 341;
Boyles v. Roberts, 222 Mo. 613;
Landrith v. Hudgins, 121 Tenn. 556;
Westminister Presbyterian Church v. Trustees, N. Y. 211 N. Y. 214.
Russie v. Brazzelle, 128 Mo. 113.
Brundage v. Deardorf, 55 Fed. R., 389;
Dabeny's Duscussions, 261-297;

XIX.

Judicatory cannot surrender church and preclude investigation.

Boyles v. Roberts, 222 Mo. 613;
Landrith v. Hudgins, 121 Tenn. 556;
Schnorr's Appeal, 67 Pa. 138;
McGinnis v. Watson, 5 Wright, 9;
Smith v. Swormstedt, 16 Howard, 289;

XX.

Courts of equity protect Trust property. The property in question is trust property. The deeds to the lots, which these houses of worship stand, create valid trusts for the respective congregations described therein, of the Cumberland Church, and such property cannot be diverted to the use of the Presbyterian Church.

Smith v. Pedigo, 145 Ind. 361;

Mt. Zion Baptist Church v. Whittmore, 83 Iowa, 147;
Park v. Champlin, 96 Iowa, 55;
Hale v. Eberett, 63 New Hampshire, p. 9;
Schnorr's Appeal, 67 Pa. St. 138;
Finley v. Brent, 87 Vir. 103;
Nance v. Bushy, 91 Tenn. 305;
Bridges v. Wilson, 11 Heisk, 458;
Mt. Helm Baptist Church v. Jones, 79 Miss., 488;
Landrith v. Hudgins, 121 Tenn. 676-7;
Boyles v. Roberts, 222 Mo. 613;
Godfrey v. Walker, 42 Ga. 562;
Deaderick v. Lampson, 11 Heisk, 523;
McKenney v. Griggs, 5 Bush, 401;
Newman v. Proctor, 10 Bush, 318;
Brown v. Mason, 80 Kentucky, 443;
Bridges v. Wilson, 11 Heisk, 457.

XXI.

Property of local church is protected as such.

Gibson v. Armstrong, 7 B. Monroe, 489;
Deaderick v. Lampson, 11 Heisk, 529;
Bridges v. Wilson, 11 Heisk, 458;
Rodgers v. Burnett, 108 Tenn. 173;
Newman v. Proctor, 10 Bush, 318;
Brown v. Monroe, 80 Kentucky, 443;
Gartin v. Penick, 5 Bush, 112;
Harper v. Straws, 14 B. Monroe, 39;
Watson v. Garvin, 54 Mo., 343;
Mt. Helm Baptist Church v. Jones, 79 Miss. 488;
Finley v. Brent, 87 Va. 103;
McBride v. Porter, 17 Iowa, 207;

Godfrey v. Walker, 42 Ga. 562;
Boyles v. Roberts, 222 Mo. 613;
Landrith v. Hudgins, 121 Tenn. 626.

XXII.

Civil courts consider doctrine to ascertain identity.

Rodgers v. Burnett, 108 Tenn. 183;
General Assembly of Free Church of Scotland v. Overton, Law Reports, Appeal Cases, 1904, p. 612;
Gartin v. Penick, 5 Bush, 110;
McGinnis v. Watson, 41 Pa. 13;
Schnorr's Appeal, 67 Pa. 138;
Mt. Zion's Baptist Church v. Whitmore, (Iowa) 13 L. R. A. 205, and citations;
Smith v. Pedigo, 145 Ind. 361;
Henrickson v. Shotwell, 1 N. J. Eq. (Saxon) 577;
True Re'fd Dutch Church v. Iserman, 64 N. J. Law, 506;
Rose v. Isaac Christ, 193 Pa. 13;

XXIII.

Separation of church and state.

Bridges v. Wilson, 11 Heisk, 470;
Watson v. Garvin, 54 Mo., 377;
Gartin v. Penick, 5 Bush, 117;
Westminster Church v. Trustees, 211 N. Y. 214;

XXIV.

Civil rights protected by State and Federal Constitution.

Schnorr's Appeal, 67 Pa. 138;

Prickett v. Wells, 117 Mo. p. 513;
Wayman v. Southard, 10 Wheaton, 50.
Watson v. Garvin, 54 Mo. 367;
Gartin v. Penick, 5 Bush, 123-4;
Ferravi v. Vasconcelles, 31 Ill. 25;
Bridges v. Wilson, 11 Heisk, 470;

XXV.

Church union cases further analyzed.

Associate Reformed Church v. Trustees of Theological Seminary, 4 N. J. Ch. R. (3 Green), 77;
McGinnis v. Watson, 41, Pa. 9;
McBride v. Porter, 17 Iowa, 203;
Ramsey's Appeal, 88 Pa. 60;
General Assembly of the Free Church of Scotland, v. Overton, Law Reports, Appeal Cases, 1904, p. 612;
Boyles v. Roberts, 222 Mo. 613;
Landrith v. Hudgins, 121 Tenn. 556;
Mack v. Kime, 129 Ga. 1;
Wallace v. Hughes, 131 Ky. 445;
Permanent Committee, etc. v. Pacific Synod, 157 Cal. 105;
Brown v. Clark, 102, Tex. 323;
Ramsey v. Hicks, 174 Ind. 428;
First Pres. Ch. v. First Cumb. Pres. Ch., 245 Ill. 74;
Sanders v. Baggerly, 96 Ark. 1177;
Harrison v. Cosby, 173 Ala., 81;
Carothers v. Moseley, 99 Miss. 671;
Pres. Ch. v. Cumb. Ch. 340 Okla. 503;

XXVI.

In each case there were certain persons who were indispensable parties to the litigation; these persons were not made parties. In their absence the Court ought not to proceed to a decree.

(a) The College case.

Shields v. Barrow, 17 How. 130, 139-42;
Kendig v. Dean, 97 U. S. 423, 425;
Barney v. Baltimore, 6 Wall., 280-284-285, 287;
Mallow v. Hinde, 12, Wheat. 194;
Elmendorf v. Taylor, 10 Wheat. 167;
California v. Southern Pacific Co. 157 U. S. 229, 256;
Gregory v. Stetson, 133 U. S. 579, 586;
Robin v. Railroad Companies, 16 Wall, 446, 450;
Consolidated Water Co. v. Babcock, 76 Fed. 243, 247-8, 252;
Consolidated Water Co. v. San Diego, 93 Fed. 849,850-3;
Consolidated Water Co. v. San Diego, 84 Fed., 369-370;
Vincent Oil Co. v. Gulf Refining Co. 195 Fed. 434, 436;
Arkansas Southeastern R. Co. v. Union Saw Mill Co., 154 Fed., 304, 311;
Eldred v. Am. Palace Car Co. 105 Fed. 457, 458;
Weidenfeld v. Northern Pac. Ry. Co., 129 305, 310;

McConnell v. Dennis, 153 Fed. 547, 549-50;
South Penn Oil Co. v. Miller, 175 Fed. 729, 736;
Baltimore, C. & A. Ry. Co. v. Godfroy, 182 Fed. 525, 535.
Chadbourne v. Coe, 51 Fed. 479, 480-1.
Construction Co. v. Cane Creek, 155 U. S. 283, 285.
Davenport v. Dows, 18 Wall., 626;
Rodgers v. Penobscot Mining Co., 154 Fed. 606;
Sioux City Terminal R. & W. Co. v. Trust Co. of North America, 82 Fed. 124;
Coiron v. Millandon, 19 How., 113;
Ober v. Gallagher, 93 U. S. 204;
Williams v. Bankhead, 19 Wall., 563;
Board of Trustees v. Blair, 70 Fed. 414;
Lawrence v. Times Printing Co., 90 Fed. 24;

(b) The General Church Case.

XXVII.

The complainants, in neither case, were proper parties complainant.

(a) General Church Case.

United States v. Old Settlers, 148 U. S. 427, 480;
Smith v. Swormstedt 16 How. 288, 302-3.
Watson v. Jones, 13 Wall., 679;

(b) College Case.

Neither the Synod of Kansas nor the individual complainants were proper parties complainant in this case.

XXVIII.

General Church Case.

The Court should have dismissed the bill as to the Mount Carmel Church property.

XXIX.

If not otherwise invalid, the alleged contract is invalid on account of fradulent practices in the procurement of the same.

Wabash R. R. v. Merrieless, 182 Mo. 126.

XXX.

The Missouri cases.

Boyles v. Roberts, 222 Mo. 613;
Haynes v. Manning, 263, Mo. 1.

BRIEF OF THE ARGUMENT.

I.

The alleged contract of union and reunion was in fact a scheme of merger of the Cumberland Church with its membership, organization, and property into the Presbyterian Church, and contemplated the utter extinction of the Cumberland Church and the destruction of its identity as a separate organization, and was void.

The alleged contract as finally consummated and declared in force, on the 26th day of May, 1906, is found in the Record, at pages 307-314

inclusive. The initial step in the scheme was taken by the respective assemblies of the two churches, in the year 1903, in the appointment of committees from each body to act jointly in working out the scheme. These committees making joint report to their respestive assemblies in 1904, provided a plan of union, which was adopted by the assemblies of 1904, and is found in the Record, at page 303. The first section of this plan provided that the two churches

> "Shall be united as one church, under the name and style of the Presbyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate Churches now possess."

By another section of the same plan is was provided:

> "The union shall be effected upon the doctrinal basis of the confession of faith of the Presbyterian Church in the United States of America, as revised in 1903, and its other doctrinal and ecclesiastical standards."

This plan of union was adopted by the General Assembly of the Presbyterian Church, with the understanding that the adoption of the same did not in itself accomplish the union, but that whether or not a union should be had between the two churches in accordance with said plan, or whether further proceedings in such behalf should be taken upon the part of the Presbyter-

ian Church, was conditioned upon the continued permanency of the Presbyterian Church, and the extinction and merger of the Cumberland Church therein, as fully appears in the following resolution by the General Assembly of that Church:

> "That the report of the vote of the Presbyteries shall be submitted by the stated clerk to the General Assembly of 1905, and if said Assembly shall find that two-thirds of the Presbyteries of the church have approved the foregoing basis of union, then the necessary steps shall be taken, *if the way be clear*, to complete the union with the Cumberland Church." (Rec., p. 650.)

In 1905 the General Assembly of the Presbyterian Church, in connection with further proceedings in said matter of union, instructed its committee having the matter in charge as follows:

> "Resolved further, that said committee be, and it is hereby authorized, to confer with the trustees of the General Assembly, if and when necessary, *in order to safe-guard the corporate or property rights of the Presbyterian Church in the United States of America*, upon and under the completion of the proposed union, and the trustees of the General Assembly are hereby directed, if so requested, to confer and comply with such requests." (Rec., p. 650.)

This committee, in 1906, made the following report to the General Assembly of the Presbyterian Church:

"Trustees of the Assembly and Corporate Rights: Your committee was empowered to confer with trustees of the General Assembly in order to safe-guard the corporate or property rights of the Presbyterian Church in the United States of America as a whole. The trustees referred the matter to their solicitors, and these legal gentlemen drew up an opinion which was submitted to your committee; from this opinion we quote as follows: 'The solicitors have not been advised as to the ecclesiastical effect of the proposed union of the Presbyterian Church and the Cumberland Church. It is a fact to be noticed, however, that these bodies were once united; they were disrupted, and they proposed to unite. If the effect of this union be that the integrity of the organization of the Presbyterian Church shall be maintained and continued, and its doctrines, tenets and beliefs, as held in the years of 1903, 1904, and 1905 be adhered to, the Cumberland Church becoming an integral portion of the Presbyterian Church, *or merged into that body*, then, and in such case, the property and various trusts which are held by the corporation and the trustees of the General Assembly of the Presbyterian Church in the United States of America, would not be affected or disturbed by such union.'

"The committee have also to state that it

has secured upon this subject of property rights and trusts, the opinion of the legal counsel of all the board of our church, and that these are in its possession. The counsel of the board, located in New York, advised that particular care be taken in the framing of the resolutions, completing the re-union and union, so as to make it clear that the Presbyterian Church in the United States of America would continue its existence, both ecclesiastical and legal, and that the Cumberland Presbyterian Church was reunited with, and *incorporated into*, said Presbyterian Church, in the United States of America. With this exception, the opinions of counsel of the boards were all to the effect that no legal difficulties or obstacles existed in the way of re-union and union of the two churches. Further, it has been distinctly understood in all the joint meetings of the two committees on union, that this particular union was a re-union; that the continued ecclesiastical and legal existence of the Presbyterian Church in the United States of America was and is fundamental to the re-union, and that the re-united church would be the Presbyterian Church in the United States of America, which existed in 1799, 1836, 1870, and 1903. It is believed that the continued ecclesiastical and legal existence of the Presbyterian Church in the United States of America has been acknowledged and secured by the resolutions of the joint report." (Rec., p. 651.)

It was with the understanding that the matters referred to in the report last above set out had been accomplished in the joint report embodying the contract of union, to be presented in 1906, that the said joint report was by the committee presented to the assembly in 1906, and it was with the same understanding on the part of the Assembly of the Presbyterian Church, that the contract of union, as embodied in said joint report and presented to them, secured the continued existence of the Presbyterian Church, and of its confession of faith and doctrinal standards as they existed in 1799, 1836, 1870, and 1903, and that the Cumberland organization was merged into it; that the said joint report was by it adopted and said contract approved and attempted to be entered into, and both the Cumberland Committee and the Cumberland Assembly, sought to consent thereto.

All doubt as to the character of the scheme being the extinction of the Cumberland Church and the merger of the same into the Presbyterian Church is dissolved upon an examination of the final committee report and of the contract as embodied therein.

The following paragraphs taken therefrom show conclusively that such was the purpose and effect:

"Be it further resolved,

2. That immediately after the declaration hereinafter provided for shall have been made,

said Confession of Faith and other doctrinal and ecclesiastical standards of the Presbyterian Church in the United States of America shall become effective and operative as to all ministers, elders, deacons, officers, particular churches, judicatories, boards, committees, and all other ecclesiastical organizations, institutions and agencies of the Cumberland Church.

3. That after the General Assembly of the Cumberland Presbyterian Church, meeting in 1906 shall have been adjourned *sine die*, as a separate Assembly, the 119th General Assembly of the Presbyterian Church in the United States of America, which shall be composed of representatives of all the Presbyteries of the re-united church shall, upon the dissolution of the General Assembly of the Presbyterian Church in the United States of America, meeting in 1906, be required by its moderator to meet on the third Tuesday of May, 1907, at eleven o'clock A. M. as provided for by the form of government of the Presbyterian Church in the United States of America. When said Assembly convenes, it shall, until a new moderator is chosen, be presided over by the moderator of the Assembly of 1906, of the Presbyterian Church in the United States of America; and it is recommended that the opening sermon be preached by the moderator of the General Assembly of 1906, of the Cumberland Presbyterian Church. The Stated Clerk of the General Assembly of the Presbyterian Church in the

United States of America, shall make up a roll of the General Assembly of 1906 of the Cumberland Presbyterian Church.

4. That all of the Presbyteries now constituting the Presbyteries of the two churches, as they exist at the time for electing commissioners to the General Assembly of 1907, shall elect commissioners to that Assembly on the basis of one minister and one elder for every twenty-four ministers or moiety thereof, as provided in the form of government of the Presbyterian Church in the United States of America.

5. That all boards, committees, trustees and other ecclesiastical agencies, now required to make report to the General Assembly of the Cumberland Presbyterian Church, be and they are hereby directed to report hereafter to the General Assembly of the Presbyterian Church in the United States of America.

* * *

7. "The corporate rights now held by the two General Assemblies and by their boards and committees shall be consolidated and applied for their several objects as defined and permitted by law.

The boards, committees, trustees and other ecclesiastical or corporate agencies, connected with either General Assembly, all of which have been hereinbefore directed to report hereafter the General Assembly of the Presbyterian Church in the United States of America, or are in duty bound to report to said General

Assembly, be and they are authorized and empowered if and when so directed by the General Assembly of the Presbyterian Church in the United States of America, to proceed, according to law, to order a dissolution, in order that the funds, property and other assets by them or any of them now severally held, be turned over to such corporate agencies, whether boards or committees, as may be permanently continued by the General Assembly of the Presbyterian Church in the United States of America; and such agencies, so permanently continued, are intended to be substituted trustees, to succeed to the administration of such trust funds, as well as thereafter to receive and distribute the benevolent offerings of all the churches and congregations now belong to either church.

8. Whereas, upon the declaration of reunion and union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, the synods, presbyteries, sessions, ministers and congregations, now connected with the Cumberland Presbyterian Church, will have been received into and become incorporated with the Presbyterian Church in the United States of America, therefore,

Resolved, (a) That the stated clerk of the General Assembly of the Presbyterian Church in the United States of America, with the assistance of the stated clerk of the General Assembly of the Cumberland Presbyterian Church, shall be, and hereby is authorized and

directed to place the names of the synods and presbyteries connected with the Cumberland Presbytrian Church, at the time of the completion of the re-union and union, upon the roll of the synods and presbyteries of the General Assembly of the Presbyterian Church in the United States of America of 1906, to-wit:

(Here follows a complete list by name of the synods of the Cumberland Presbyterian Church and of all the Presbyteries of that body.)

(c) That the list of the churches and ministers of the Cumberland Presbyterian Church, as existing at the time of the reunion and union, and certified to by the stated clerk of the General Assembly of the Cumberland Presbyterian Church, be printed by the stated clerk of the General Assembly of the Presbyterian Church in the United States of America, in the minutes of the latter church for 1906.

9. Resolved, That after the completion of the reunion and union, the boards and committees now connected with the General Assembly of the Cumberland Presbyterian Church be entered in the list of the boards and committees of the General Assembly of the Presbyterian Church in the United States of America, and that under their appropriate names, with their members and officers, they be published in the minutes of the General Assembly of the Presbyterian Church in the United States of America for 1906.

11. Resolved, That the respective General Assemblies hereby recommend with the 119th General Assembly of the Presbyterian Church in the United States of America, that when steps shall be taken to adjust the boundaries of the several presbyteries and synods and to define and name the same, preference be given as far as possible to the names now used in the Cumberland Presbyterian Church for its presbyteries and synods in the south and southwest; that conversely, preference be given as far as possible, to the names now used by the Presbyterian Church in the United States of America in the north and northwest; and that in the border territory great care be taken to preserve any names that embody associations dear to either church.

14. When this joint report, including its recitals and resolutions, shall have been adopted by the General Assembly of each of said churches, and official telegraphic notice of such adoption has been received by each Assembly from the other, the moderator of each Assembly is empowered and directed in behalf of his General Assembly and church, to declare and publicly announce in open session of said Assembly, and have it recorded on its minutes, the full consummation of the reunion and union of said churches in the following words:

'The joint report of the two committees on reunion and union, and the recitals and resolutions therein contained and recommended for adoption, having been adopted by the Gen-

eral Assembly of the Presbyterian Church in the United States of America, and the General Assembly of the Cumberland Presbyterian Church, and official notice of such adoption having been received by each of the said General Assemblies from the other; I do solemnly declare and here publicly announce that the basis of reunion and union is now in full force and effect, and that the Cumberland Presbyterian Church is now reunited with the Presbyterian Church in the United States of America, as one church, and that the official records of the two churches during the period of separation, shall be preserved and held as making up the history of the one church.'

And when said declaration shall have been publicly made in the General Assembly of the Presbyterian Church, no business in that General Assembly shall be in order, except a motion to adjourn *sine die*, as a separte assembly." (Rec., pp. 15-19, Rec., pp. 309-313.)

Upon the adoption of said report, the moderator of the General Assembly of the Cumberland Presbyterian Church declared the same adjourned *sine die* in accordance with the directions of the alleged contract of union . (Rec., pp. 115, 284-5.)

The presbyteries and synods of the Cumberland Church, together with all the local congregations thereof, by name, were thereupon added to the roll of the Presbyterian Church. (Rec., p. 286.)

Likewise all the ministers and licentiates of the Cumberland Church, by name, were added to the roll of ministers of the Presbyterian Church. (Rec., p. 286.)

In *Boyles* v. *Roberts*, 222 Mo., at pages 691-2, thereof, the court, upon motion for rehearing, said:

> "It is contended that the General Assembly of the Cumberland Church had full control of the subject and had authority to do what they essayed to do and what respondents think they accomplished. Before and until the accomplishment of that act, there were two separate organizations, two separate entities, the Presbyterian Church, U. S. A., and the Cumberland Presbyterian Church, each having a Confession of Faith essentially different from the other, at least a Confession of Faith which one of them interpreted to be essentially different from the other, and which because of that interpretation, whether right or wrong, held itself independent of and separate from the other, but that act, whether we call it a merger, a union, or a reunion, if full effect be given to it, was an extinguishment of the Cumberland Presbyterian Church as an entity; it was an extinguishment even of the General Assembly which committed the act."

The Supreme Court of the State of Tennessee, in the case of *Landrith* v. *Hudgins*, 121

Tenn., p. 597-600, wherein the same scheme, an alleged contract, was in question, said:

"From the plan of reunion and union of the two churches, and the joint report on reunion and union, made by the General Assembly of 1906, two facts are apparent. The first of these is that the Presbyterian Church in the United States of America would continue its existence, both ecclesiastically and temporally. This further appears from a report of the committee of the Presbyterian Church, U. S. A., to its General Assembly, in 1906, stating among other things, that:

" ' The counsel of the board, located in New York, advised that particular care be taken in the framing of the resolutions, completing the reunion and union, so as to make it clear that the Presbyterian Church in the United States of America, would continue its existence, both ecclesiastically and legally, and that the Cumberland Presbyterian Church was reunited with, and incorporated into, said Presbyterian Church in the United States of America. * * * Further, it has been distinctly understood in all the joint meetings of the two committees on reunion and union, * * * that the continued ecclesiastical and legal existence of the Presbyterian Church in the United States of America, was, and is fundamental to the reunion, and that the reunited church would be the Presbyterian Church in the United States of America, which existed in 1799, 1836, 1870, and 1903. It is believed

that the continued ecclesiastical and legal existence of the Presbyterian Church in the United States of America has been acknowledged and secured by the resolutions of the joint report.'

"The second fact apparent from the said plan and the said joint report, is that the Cumberland Church surrendered its name, its creed, and its organization, and became absorbed in the Presbyterian Church in the United States of America. This distinctly appears from the first sub-division of the plan; also from the following, which appears in the joint report, thus:

'That immediately after the declaration provided for in the 14th section of the report, the Confession of Faith and other doctrinal and ecclesiastical standards of the Presbyterian Church in the United States of America, shall become effective and operative as to all the ministers, elders, deacons, officers, particular churches, judicatories, boards, committees, and all other ecclesiastical organizations, institutions and agencies of the Cumberland Presbyterian Church! that the General Assembly of 1906 of the Cumberland Presbyterian Church shall adjourn *sine die;* that the boards, committees, trustees, and other ecclesiastical or corporate agencies connected with the General Assembly which had been theretofore directed, or should thereafter be directed to report to the General Assembly of the Presbyterian Church in the United States of America, or were in duty bound to report to

that General Assembly, were authorized and empowered, if, and when so directed by the General Assmbly of the Presbyterian Church in the United States of America, to proceed according to law to order a dissolution, in order that the funds, property and other assets, by them or any of them held, should be turned over to such appropriate corporate agencies, whether boards or committees, as should be permanently continued by the General Assembly of the Presbyterian Church in the United States of America; and that such agencies, so permanently continued, were intended to be substituted as trustees to succeed to the administration of such trust funds, as well as thereafter to receive and distribute the benevolent offerings of all the churches and congregations theretofore belonging to either church; and also upon the declaration provided for in Section 14, the synods, presbyteries, sessions, ministers, and congregations, before connected with the Cumberland Church, would thereby have been received into and become incorporated with, the Presbyterian Church in the United States of America; that the stated clerk of the General Assembly of the Presbyterian Church in the United States of America, with the assistance of the stated clerk of the General Assembly of the Cumberland Church, should be and was thereby authorized and directed to place the names of the synods and presbyteries connected with the Cumberland Presbyterian Church at the time of the completion of the union, on the roll

of the synods and presbyteries of the General Assembly of the Presbyterian Church in the United States of America."

The scheme involves not only the complete extinguishment of the Cumberland organization, ecclesiastical, legal and temporal, and the destruction of its identity, together with the transfer of its corporate and property interests to the Presbyterian Church, but also the enforced transfer of the entire ministry and membership of the Cumberland Church to the Presbyterian Church, and the enforced acceptance of its Confession of Faith, and enforced subjection to its jurisdiction and government, by such membership and ministry, and the enforced acceptance of membership therein, and support thereof. For it necessarily follows that if the plan be sufficient to carry the property to the Presbyterian Church, it must also at the same time be sufficient to accomplish the transfer of the membership to that body.

Such a scheme is self-condemned. It violates the constitution of the Cumberland Church, and is in contravention of the laws of the land guaranteeing religious liberty and protecting church property against diversion, it is a merger and absorption involving the personal right of each and every member of the Cumberland Church, and is void. It depends upon the personal consent of all persons to be affected thereby, for its validity. Such consent must expressly appear, and not having been given by the ap-

pellants and those they represent in this case no authority therefor existed in the General Assembly of the Cumberland Presbyterian Church.

In the case of the *Associate Reform Church* v. *Trustees of the Theological Seminary* 4th N. J. Equity, 77, a merger of the exact same character as that in question here between the Presbyterian Church and the Associate Reform Church, was involved. The respective judicatories of the two churches had entered into an agreement or contract, the result of which, if allowed to become effective, was the surrender of the name, organization, membership and property of the Associate Church to the Presbyterian Church, and a merger of the same therein.

The court held that under the constitution of the Associate Reform Church there was no authority for such a union or merger, and that the contract therefor was invalid and non-effective to extinguish the Associate Reform Church or to transfer its organization, ministry, membership or property to the Presbyterian Church. The court, among other things, said:

> "Upon a fair construction of these articles of union, it is manifest that the Presbyterian Church was the body that was to survive; * * * it was the obivious intention of those who formed the union, as is evident from the articles of union themselves, and the proceedings had therein, that the Associate Reform Church should be merged in the Pres-

byterian Church, to all intents and purposes; and such has been the fact with regard to those who came in under the union; and such would have been the effect of the whole church if those articles of union had been considered by all as obligatory. By this act they not only interfered with the established order of the church, but actually destroyed the church of which they are the highest judicatories. It has not been contended, nor do I think it can be, that the power of the General Synod of the Associate Reform Church had this extent. Chancellor Dessaure very justly remarks that: 'One of the fundamental rules of all incorporated bodies is, that the members are not to do any act which may destroy its existence or injure its privileges' and the reason of the rule applies with equal force to voluntary associations.

"I therefore conclude, that the union is invalid and that the Associate Reform Church still have the same rights and interests in these books and funds that they had before the adoption of these articles of Union."

4th N. J. Ch., 96-97.

In the Free Church of Scotland case, a union or merger of like character as the one in question here, whereby the judicatories of the Free Church of Scotland undertook to unite it with, or merge it into, the United Presbyterian Church, under the name of the United Free Church, was involved. The temporal and ecclesiastical organization of the Free Church of

Scotland as a separate body had been extinguished and its membership, ministry, agencies, boards, committees and property had been sought to be transferred to the jurisdiction of another and separate body. In one of the opinions therein by Lord Lindley, he held:

> "If therefore, a synod or council, under color of exercising their authority, were to destroy the church which they were appointed to preserve, or were to abrogate the doctrines which they were appointed to maintain, their acts would be *ultra vires* and invalid in point of law; and it would be the duty of every court in the United Kingdom so to hold."

Law Reports, Appeal cases, 1904, p. 695.

The Supreme Court of the State of Missouri, in case of *Boyles* v. *Roberts* 222 Mo., p. 689, said of this scheme and alleged contract, the validity of which was involved therein:

> "This union is an unwarranted merger of the Cumberland Presbyterian Church into the Presbyterian Church, U. S. A. It is an unwarranted surrender of name, Confession of Faith, judicatories, and an unconditional merging of the one church into the other. We say 'Unconditional Surrender and Merger' because one party kept name, creed government and everything, whilst the other abandoned everything. Such merger have been condemned by the best considered cases both in this country and in England.

"In England the attempted union and merger of the Free Church of Scotland and the United Presbyterian Church was condemned by the House of Lords."

Appeal Cases, 1904, p. 695.

"Such a union is likewise condemned by one of the strongest Chancery Courts of this country, that of New Jersey."

Associate Reform Church v. *Trustees of Theological Seminary*, 4th N. J. Equity, p. 77.

"You cannot, by union or merger, put one church into another having a different creed and doctrine, without forfeiting the property held in trust to such members of the body as remain faithful to the original creeds and doctrines."

Boyles v. *Roberts*, 222 Mo., 690.

The bills of complaint in both cases herein are drawn upon the theory that the entire former membership and property of the Cumberland Church has been passed to the jurisdiction of the Presbyterian Church, and that the identity of the Cumberland Church has been destroyed and become extinct. That the Presbyterian Church is now soverign, where once the Cumberland reigned supreme, and is entitled to the management, control and use of all the properties of the Cumberland Church, and of its various judica-

tories and congregations, and is entitled to enforce its contract of membership upon and against all members of the Cumberland Presbyterian Church.

The Cumberland Presbyterian Church is but an unincorporated voluntary society for religious purposes; it has existed as such since the year of 1810. It has a written constitution and Confession of Faith, which is a contract of membership in the association or society, and is binding upon all portions of the church, including the executive, legislative and judicial bodies and agencies thereof, as well as the membership. It is the supreme law of the church and must be adhered to by every part thereof.

Boyles v. *Roberts*, 222 Mo., 677.

As such voluntary, unincorporated society, it is entitled to the same privileges as other voluntary societies under the laws of the land, and is likewise under the same limitations. The law of voluntary societies in all its phases is applicable alike to it and other voluntary societies.

(*b*) *The General Assembly of the Cumberland Church could do no act that might destroy the existence of the church or injure its privileges, except and alone, as authorized by the consent of the entire church, including the membership, as evidenced in and authorized by the constitution of the church.*

Associate Reform Church v. Trustees Theological Seminary, 4 N. J. Equity, 77.

(*c*) *The effect of the action of the General Assembly of the Cumberland Church, in undertaking to enter into and promulgate the alleged contract of union, was to destroy the church it was appointed to preserve, and to abrogate the doctrines it was appointed to maintain; this it could not do.*

Law Reports, Appeal Cases, 1904, p. 695.

In the above cited case of *Boyles* v. *Roberts*, 222 Mo., p. 691-2, the Supreme Court of the State of Missouri, passing upon the question of power in the General Assembly of the Cumberland Church to extinguish the Cumberland Church, said:

"As a rule, an executive body appointed to administer the affairs of an association, is created to effectuate the purpose of the Association, to preserve it, not to destroy or extinguish it. However plenary in words the powers given to such a body may be, they must be construed in the light of the purpose for which they were given. In this particular, there can be no difference between a church organization and an organization of any other kind, unless it be that the presumption that the executive board was created to preserve and perpetuate, is stronger in regard to church organizations than any other, because a church organization always looks to perpetuity.

"It is almost impossible to imagine an organization delegating to its executive board or to its administrative body, by whatsoever name it may be called, the power to take its own life, to destroy the organization; certainly no such power can be implied; if it is conferred, it must be by express terms. There is nothing in the record in this case to show that any such power was conferred on the General Assembly of the Cumberland Church. All the powers conferred were to aid in carrying into effect the purpose for which the church was organized."

Neither could a majority of the membership, or any other portion thereof, less than the entire membership, so long as a sufficient number thereof remained to maintain the society and transact its business, destroy the existence of the church, unless authority be found therefor in the constitution or contract of membership.

Enc. Law & Procedure, 4th Vol., p. 315; *Burk* v. *Roper*, 79th Ala., 138.

If the Presbyterian Church, U. S. A., could not have been destroyed as a separate organization, and merged into the organization of the Cumberland Church, and under the jurisdiction of the latter, without destroying the trust upon which the property of that denomination and the various bodies thereof was held, how can it be contended that the existence of the Cumberland Church as a separate organization

may be destroyed and it merged into the organization of the Presbyterian Church, U. S. A., and placed under its jurisdiction, without also destroying the trust upon which the property belonging to it, or any of the various bodies thereof, is held?

If it was necessary to the preservation of the trust upon which the property held by the Presbyterian Church, its various judicatories and congregations, that the organization of the Presbyterian Church, both ecclesiastical and temporally be maintained, then why was it not equally necessary for the preservation of the trusts upon which the property of the Cumberland Church, its various judicatories and congregations, was held, that the organization of the Cumberland Church, both ecclesiastically and legally, be maintained?

If it was necessary to the preservation of the trusts upon which the properties of the Presbyterian Church and of its judicatories and congregations, were held, that the reunited church should be the Presbyterian Church in the United States of America, as it existed in 1799, 1836, 1870 and 1903, then why was it not equally necessary, in order to preserve the trusts upon which the property of the Cumberland Church and of its judicatories and congregations were held, that the reunited church should be the Cumberland Church, as it existed in 1810, 1829, 1883 and 1906?

Clearly it is true that neither church could

permit a merger of itself into the other under the law of the land, without violating the trust upon which its property had been acquired, and that it was essential to a preservation of the trust in either body, that both its separate ecclesiastical and legal identity be preserved and maintained.

II.

The enforced merger of the membership into and with the Presbyterian Church is in violation of the law of the land and void. The matter of church affiliation and membership is and must be a purely personal and voluntary matter. There existed no authority in the General Assembly of the Cumberland Church to transfer the ministry and membership of that church to the ministry and membership of the Presbyterian Church.

The Presbyterian Church was a separate society and association from the Cumberland Presbyterian Church. It had a written constitution and Confession of Faith, consisting a contract of membership therein, and no one could become a member thereof without voluntarily and personally consenting to such contract and membership. It is familiar law that no one could invoke the benefits of such contract of membership or incur any liability thereunder, without first personally assenting thereto and becoming a member thereof. The same principle of the meeting of the minds of the contratcing parties in order to make a valid contract is applicable here, as in all other contracts. There can be no

contract without the meeting of the minds, and without the contract there can be no membership.

Konta v. *Stock Exchange*, 189 Mo., 261.

The consent or willingness of the Presbyterian Church to such membership is not sufficient; the consent of the Cumberlands must also appear. The consent of appellants and those they represent has never been given, neither has any authority been given to the General Assembly of the church or other body to consent for them.

The action in this behalf of the General Assembly of the Cumberland Church, when it seeks, without and against the consent of any member of that church, to deprive him of church relationship of his own choice, and to transfer him to the Presbyterian Church, and make him a member thereof, and compel his consent thereto, or in lieu thereof to relinquish all interests and properties acquired and held by the Cumberland Church for church uses, is in contravention of the law of the land, and in defiance of the personal rights of such member, as guaranteed by the bill of rights and constitution of practically every state in the Union. Section five of the Bill of Rights of the State of Missouri, provides:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience;

that no human authority can control or interfere with the rights of conscience."

Section six provides:

"That no person can be compelled to erect, support, or attend any system of worship, or to maintain or support any priest, minister, preacher, or teacher of any sect, church, creed or denomination or religion; * * *"

The scheme in question requires the member of the Cumberland Church to become a member of and affiliate with the Presbyterian Church, and as a member thereof, in compliance with its rules and requirements, to attend and support its system of worship. If not based upon the consent of such member, such requirement is absolutely void; the existence of such consent cannot be implied, it must be expressly given and shown.

Boyles v. *Roberts*, 222 Mo., 691-2.

III.

Constitutional authority must be shown by those asserting it.

In every instance where civil rights are sought to be affected by ecclesiastical action, it must be made to appear to the civil court, called upon to judge such rights, that the action in question was within the constitutional power of the particular body, and the burden of showing this is upon those making the claim.

Keer's Appeal, 89 Pa., 97;
Schnorr's Appeal, 67 Pa., 138;
Gartin v. *Penick*, 5 Bush., 110, also Mr. Redfield's notes of the same case;
9th Am. L. Reg. N. S., 210-221;
Chase v. *Cheeney*, 10 Am. L. Reg. N. S. and Mr. Fuller's notes of the same case, p. 308;
Bear v. *Heasley*, 98 Mich;
Free Church of Scotland case;
Appeal cases, 1904, p. 612;
Boyles v. *Roberts*, 222 Mo., 613, l. c., 655.

In Kerr's appeal, 89 Pa., 97, the court says:

"The decree of a Church Judicatory is binding only where it is affirmatively shown that it is acting within the scope of its authority and has observed its own organic forms and rules."

Mr. Redfield says:

"We do not understand that any such presumption in favor of the jurisdiction of these church courts obtained as in the case of the Superior Court of General Jurisdiction in State or Nation; but on the contrary, everything requisite to create the jurisdiction must be proved affirmatively by any who claim the benefit of their action, as in the case of courts of limited and summary powers within the state, or of all foreign courts, as church courts surely may be regarded."

9 Am. L. Reg. 210-221.

In *Boyles* v. *Roberts*, 222 Mo., 655, the court says:

"The idea is well expressed by the Michigan Court in the Bear Case; 'it has been expressly held by this court that the provision of the Federal Constitution that full faith and credit shall be given in each state to the records and judicial proceedings of every other state does not preclude an inquiry into the jurisdiction of courts; and if, in fact, the subject-matter of a suit was not within the jurisdiction of the state from which the court derives its authority, its judgment is a nullity, and may be so treated everywhere.'

"It is useless to cite cases in Missouri that we will see that the foreign court had jurisdiction before we give its judgment the full faith and credit required by the Federal Constitution. By what reason can it be said that we shall blindly register the decrees of ecclesiastical bodies holding their courts respectively in Illinois and Iowa?"

IV.

The scheme is null and void because not authorized by the constitution of the Cumberland Presbyterian Church. It is not only not authorized thereby, but it is in conflict therewith, and in open defiance and subversion therof.

The Cumberland Presbyterian Church is of the associated class of religious societies, with the local congregation or particular church, as the basis or initial unit thereof. In regular

gradation from it, arise the "court" so termed, of the society or association, the first of which is the session, the second is the presbytery, embracing in its jurisdiction all the local churches and ministers thereof within a given territory; third, the synod, embracing within its jurisdiction not less than three presbyteries and the local churches and ministers therein; and fourth, the General Assembly, which embraces within its jurisdiction all the churches, presbyteries and synods of the entire association, and constitutes the Supreme Judicary of the church.

As the basis of the association or church is a written constitution and Confession of Faith, and other standards, which constitute the contract of membership in the association. These set out with particularity the creed, doctrines and beliefs of the church, and give its scheme a form of government, designating the manner of exercise thereof, and the instrumentalities therefor, together with the power and authority to be exercised by each, and the manner of practic and procedure to which each instrumentality or court was limited. It was a chart to which each member assented upon becoming a member of the church, and the chart, upon the terms of which he relied when induced to accept membership therein.

This contract of membership is binding upon all portions of the church as well as all judicatories thereof. It is the Supreme Law of the church, and must be adhered to by every part

thereof. That such organizations cannot go beyond their constitutional powers is amply shown by the cases:

Boyles v. *Roberts*, 222 Mo., p. 677;
Watson v. *Avery*, 2nd Bush, p. 332;
Bear v. *Heasley*, 98 Mich., p. 279;
Bunn v. *Gorgas*, 41 Pa. St., 446;
Krecker v. *Shirley*, 163 Pa. St., 534.

The constitution names the "courts" of the church and defines the power of each. These courts are denominated church sessions, presbyteries, synods, and general assemblies. (Rec. 24, Constitution, Rec., p. 318.)

And the jurisdiction of each court is limited by the express provisions of the constitution. (Constitution, Sec. 25, Rec., p. 318.)

The powers respectively of each of said courts, appears in the record herein. The powers of the session appear at page 318 of the printed record, and also at page 42 of the statement in this brief. The powers of the presbyteries are found at page 319 of the record herein, and again at page 43 of the statement of this brief. The powers of the synod are found at page 320 of the record herein, and again at page 44 of the statement in this brief. The powers of the general assembly are found at page 321 of the record herein, and again at page 44 of the statement in this brief.

The powers of the general assembly are great-

er and more comprehensive than are the powers of any of the other or inferior courts, and for convenience we again here set the same out:

"The general assembly shall have power to receive and decide all appeals, references and complaints, regularly brought before it from the inferior courts; to hear testimony against error in doctrine and immortality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction in conformity with the government of the church in all cases submitted to it; to review the records of the synods; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church, to create, divide or dissolve synods, to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor: *to receive under its jurisdiction other ecclesiastical bodies*, whose organization is conformed to the doctrine and order of this church; to authorize synods and presbyteries to exercise similar powers in receiving bodies suited to become constitutents of those courts and lying within their geographical bounds respectively; to superintend the affairs of the whole church; to

correspond with other churches; and in general to recommend measures for the promotion of charity, truth and holiness throughout all the churches under its care."

No authority is found here for the extinguishment of the Cumberland Church or for its transfer to and merger with, or into, another church, or for the making and execution of the scheme and alleged contract involved herein. Nor is such authority given to any of the other courts of the church, either separately or in conjunction with the General Assembly. Upon the contrary the section seeks to secure the permanence of the Cumberland Church as a separate and distinct organization and the General Assembly in the exercise of the powers committed to it, is subjected to the government of the church.

The powers of the General Assembly are definitely prescribed and assigned by the terms of the constitution, and it has such powers only as are delegated to it by that instrument.

Miller defines a constitution as "a written instrument by which the fundamental powers of government are established, limited and defined."

Miller Constitutional Law, p. 71.

"A written constitution is in every case a limitation upon the powers of government in the hands of agents; there never was a writ-

ten republican constitution which delegated to functionaries all the latent powers which lie dormant in every people, and are boundless in extent and incapable of definition."

State v. *Ah Chuey*, 14 Nevada, p. 79; Cooley on Constitutional Limitations, p. 41.

"That by which the powers of government are limited."

Kemper v. *Hawkins*, 1st Vir. cases, 20-24.

"The organization of the government, distributing its powers among bodies of magistracy and declaring their rights, and the liberties reserved and retained by the people."

French v. *State*, 52 Mass., p. 759-762.

"The word constitution is used in a restricted sense, as implying the written instrument agreed upon by the people of the union, or of any one of the states, (in this case of the church as an association), as the absolute rule of action and decision for all departments and officers of the government, in respect to all points covered by it, which must control it until it shall be changed by the authority which created it."

Cooley's Constitutional Limitations, p. 3.

"Constitution may be defined to be the fun-

damental law of a state, (in this case of the church), which contains the principles upon which the government is founded, regulates the division of the sovereign powers, and directs to what persons each of these powers is to be entrusted and the manner of its exercise."

Enc. Law., vol. 8, p. 715.

"The theory of our government, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and judicial branches of these governments are all limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations from individuals' rights without which, the social compact could not exist, and which are possessed by all governments worthy of the name."

Citizens Saving and Loan Association v. *Topeka*, 20 Wall, 665.

The government of the Cumberland Church is representative in character, claimed to have been fashioned upon the same plan as our State and National government.

"The government of the union, then, (whatever may be the influence of this fact on the case), is emphatically and truly a government

of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. This government is acknowledged by all to be one of enumerated powers. The principle that is can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments, which its enlightened friends, while it was pending before the people, found it necessary to urge. That principle is now universally admitted."

McCulloch v. *State of Maryland*, 4 Wheaton, 405.

In addition, by section 25 of the constitution, the powers of the respective courts are limited by the express provisions of the constitution. Said section is found at page 318 of the record herein, and is as follows:

"The church session exercises jurisdiction over a single church; the presbytery over what is common to the ministers, church sessions and churches within a prescribed district; the synod over what belongs in common to three or more presbyteries, and their ministers, church sessions and churches and the General Assembly over such matters as concern the whole church; *and the jurisdiction of these courts is limited by the express provisions of the constitution;* every court has the right to resolve questions of doctrine and discipline

seriously and reasonably proposed, and in general to maintain truth and righteousness, condemning erroneous opinions and practices which tend to the injury of the peace, purity or progress of the church; and although each court exercises exclusive original jurisdiction over all matters especially belonging to it, the lower courts are subject to review and control of the higher courts in regular gradation. All church courts shall be opened and closed with prayer."

Under the scheme of government of the Cumberland Presbyterian Church, the General Assmbly and other church courts had only such power as was conferred upon them under the provisions of the constitution, and they could not lawfully exercise other powers. They had no power to do anything not conferred by the constitution, which all concerned in the first instance agreed should be the contract of membership, and should measure the duties, and should determine the power and authority of each court and judicatory thereof.

The right of any member to insist upon the strict observance of the same is equal to the right of each and every other member.

The General Assembly of the Cumberland Church, had no right to entertain any question concerning the union of the Cumberland Church with another body, unless and except as such right was given by the constitution, and then

only the kind and character provided and in no other manner and to no other extent. That instrument contains no express provision for such scheme as that herein involved. There was therefore no express power to adopt it; and we think it equally clear that there is no implied or inherent power to do it. It is axiomatic that an implied power can exist only as an incident to an express power, and in aid of it. It is the minor power growing out of an express grant, and arises by implication when indispensable to the proper and effective execution of the express power.

(*b*) *The alleged scheme is not only not authorized by the constitution, but is in conflict therewith and prohibited thereby, and is in open defiance and in subversion thereof.*

The General Assembly is given power:

> "To concert measures for promoting the prosperity and enlargement of the church;" "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church." (Section 43, p. 321 of the Record.)

By the section referred to, is was given the right to entertain a proposition of union, but was limited within certain bounds. It was not given an unlimited right to make a union with any and every church organization, which the assembly might deem desirable, nor was it given the right to make a union on such terms as

might be found convenient or easily acceptable to other bodies.

It was limited, first, to a scheme or contract with a certain class, to-wit: "*Ecclesiastical bodies, whose organization is conformed to the doctrine and order of the Cumberland Church.*"

It was limited, second, to a scheme or contract, "*receiving*" such ecclesiastical body, "*under its jurisdiction.*"

Note the language: "To receive under its jurisdiction ecclesiastical bodies, whose organization is conformed to the doctrine and order of this church."

No union is authorized, even with a church of the same doctrine and order, except upon condition that the permanency of the Cumberland Church as an orgaization be continued and its *jurisdiction maintained.* The scheme in question completely wipes out the Cumberland Church and its existence. Its *jurisdiction* is destroyed, and the *jurisdiction* of the Presbyterian Church is substituted therefor. Instead of *receiving* the Presbyterian Church under its *jurisdiction,* in accordance with the terms of union for which authority was given the General Assembly, its jurisdiction is proposed to be surrendered, and it passed to and received under the jurisdiction of the Presbyterian Church. The powers given do not authorize the present

scheme with its consequent merger of the Cumberland Church into the Presbyterian Church.

By no sound rule of construction can it be said that the power to promote the prosperity and enlargement "of this church" and to receive other bodies into "this church," includes the power to promote the prosperity and enlargement of another church by putting "this church" into that one.

The language is plain and unambiguous, and being so, there is no room for argumentative construction.

The constitution, in prescribing the bodies with which the General Assembly was authorized to make a union, and the terms upon which it was authorized to make one, in effect, prohibited the making of a union with any other body than the class designated, and upon any other terms than those designated.

In *Page* v. *Allen*, 58 Pa. St., 338, the court said:

> "Inhibitions of the constitution as to legislation are to be regarded as well when they arise by implication as by expression, and that the expression of one thing in the constitution is the exclusion of things not expressed."

The expressed restriction to certain specified powers is equivalent to prohibition against the usurpation of any other power.

People v. *Draper*, 15 N. Y., p. 543;
Lynn v. *Polk*, 8 Lea, p. 169;
Norment v. *Smith*, 5 Yerg., p. 272;
Boyles v. *Roberts*, 222 Mo., pp. 683-4.

In*Norment* v. *Smith*, the court says:

"Whenever a State Constitution prescribes a particular manner in which power shall be executed, it prohibits any other mode of executing such a power. On this particular subject, the authority is exhausted by the constitutional provision, and an attempt to render it nugatory by law would be an attempt at repeal. The constitution being the paramount law, the act of the assembly coming in conflict would be void."

Referring to the same rule and to the above case, the court in *Lynn* v. *Polk* said: It rests

"On the principle that an affirmative prescription involves a prohibition that its opposite shall be at the same time, because the existence of the one of necessity excludes the opposite."

8 Lea., p. 169.

On the preceding page, 168, of the report last cited, the court quoted a part of the language of the opinion in *People* v.*Draper*, 15 N. Y., 543 as follows:

" * * * But the affirmative provisions of

the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision."

In the case of *Boyles* v. *Roberts*, 222 Mo., pp., 681-4, wherein the question of the power of the General Assembly to make the identical union in question was under consideration, and where the construction and effect of the identical clause now in question was under discussion, the court said:

"We are firmly of the opinion that there was no power in the General Assembly of the Cumberland Presbyterian Church to submit the question of union * * *."

After quoting section 43 of the church constitution enumerating the powers of the General Assembly, the court proceeds as follows:

"It will be noticed that there are but two provisions herein that relate to changing the church status, and we mean by that the church as a whole. First it says, 'To concert measures for promoting the prosperity and enlargement of the church,' and secondly, 'To receive *under it jurisdiction* other ecclesiastical bodies whose organization is conformed to the doctrines and order of this church.'

It is hardly necessary to say that the word 'church' in these clauses quoted has reference

to the Cumberland Presbyterian Church and none other.

In this light does the enlargement of the Cumberland Presbyterian Church, as spoken of in the first quoted clause, means absolute surrender of the name, organization and creed of the church? To my mind it means to enlarge the Cumberland Presbyterian Church organization itself, and not to destroy or surrender it. This construction receives sanction in the second clause quoted, because it there provided one method of enlargement and that is *to receive* unto itself other organizations of like creed and faith.

These powers, when farily construed, mean: (1) That by work in different ways they shall strive to secure individual members to join and thus enlarge the church; and (2) to receive other bodies of similar faith, creed and government. Neither of these contemplates the merger of the church into another organization.

The constitution has dealt with the matter of enlarging the church, and in a manner which does not indicate that there should be surrender of the church organization, the church name or creed. Authority *to receive* unto itself does not mean to go to another body.

The written instrument having mentioned the specific way by which mergers or union can be formed with the church, i. e., by receiving other bodies *under its jurisdiction*, ex-

cludes the idea of enlargement by such church going in under another organization.

The maxim '*Inclusio unius, exclusio alterius*' has peculiar application here. There is express provision for the consolidation of this church with other churches, but that provision is for the other to so amend its creeds, doctrines and form of government, as to make them conform to that of the Cumberland Presbyterian Church, and then go in under the jurisdiction of the Cumberland Presbyterian Church. Had the constitution been silent upon the question as to how the Cumberland Church should unite with other churches, there might be something in what respondents call the inherent power to unite. If the written constitution prescribes a method for union, and this constitution does, that method and none other should be followed. Any other method would be *ultra vires*. When they dealt with the question of merger or union, as they did, then the method adopted excludes the idea of any other. This constitutional method was 'To receive under its jurisdiction other ecclesiastical bodies, whose organization is conformed to the doctrine and order of this church.'

The constitution provides for union in express terms, but the one sought and attempted to be consummated was not such as is prescribed by the constitution. It was violative of the constitution and therefore void.

The sovereign power rests with the church as a whole, and the several judicatories, be-

ginning with the church session and ending with the assembly, are but agencies of the church, with granted powers, which are expressly limited by section 25 of the constitution. The General Assembly is not the church, neither is any other minor judicatory. They are but constitutional agents of the church, and whilst they can amend the constitution as well as the creed, yet until it is amended in strict compliance with the limiting terms of the constitution, the existing organic law is binding alike upon the General Assembly and the humblest member. So that we say that the attempted method of union was in direct violation of the constitution and void. In other words, until the church has amended section 43 of its constitution, it cannot form a union with any other ecclesiastical body, except to receive such body under its own jurisdiction."

(c) *The history of the constitution shows its purpose to be to prohibit such a scheme as the one involved.*

The present constitution of the Cumberland Presbyterian Church was adopted in the year 1883. At that time the powers and prerogatives of the General Assembly of the church and of the other courts thereof, as they had existed since 1829, were amended and restated, with a direct object in view, we contend, of preventing the surrender of the Cumberland Church and its organization, and the merger thereof

into the Presbyterian Church or any other body, by the General Assembly or by the Assembly and other church courts, and to render impossible the making of a scheme or contract by such body or bodies with other organization, such as the scheme and alleged contract involved herein.

From 1829 to the adoption of the present constitution in 1883, the powers of the General Assembly were as follows:

> Section IV. "The General Assembly shall admit and judge of the appeals regularly brought before it from the inferior judicatories; give their judgment on all references of ecclesiastical cases made to them; review the synodical books, redress whatever has been done by the synods contrary to order; take effectual care that the synods observe the constitution of the church; make such regulations for the whole body and of the synods, the presbyteries and churches under their care as shall be agreeable to the word of God and the constitution of the church."
>
> Section V. "To the assembly also belongs the power of consulting, reasoning, and judging in all controversies respecting doctrine and discipline; of reprieving, warning, or bearing testimony against error, and doctrine or immorality, in practice in any church, presbytery or synod; of corresponding with other churches; of putting a stop to schismatical conditions and disputations; and in gen-

eral of recommending and attempting reformation of manners, and promoting purity, truth and holiness through all the churches, and of altering, dissolving and creating new synods, when they judge it necessary." (Rec., p. 665.)

In 1883, the two clauses above referred to were added to the constitution, to-wit: The clause,

"*And the jurisdiction of these courts is limited by the express provisions of the constitution,*" (found in Section 25 of the constitution, page 318 of the Record), and the clause, "*To receive under its jurisdiction other ecclesiastical bodies, whose organization is conformed to the doctrine and order of this church; to authorize synods and presbyteries, to exercise similar powers in receiving bodies suited to become constituents of those courts, and lying within their geographical bounds respectively.*" Found in section now numbered 43 of the constitution, at page 321 of the record, enumerating the powers of the General Assembly.)

This revision of 1883, was occasioned by the fact that in 1867 a proposition for union between the Cumberland Church and the Presbyterian Church in the United States (southern branch) had come up in the General Assembly, and a committee had been appointed in that body for the consideration of the same, (Rec.,

pages 47-50) and that again in 1873, a proposition had come up in the Assembly of the Cumberland Church for union with the Presbyterian Church in the United States of America, and a committee had been appointed for the consideration of the same (Rec., pages 50-1.) There had been numerous expressions of regret upon different occasions and in different bodies from the organization of the Cumberland Church, on account of the differences with and withdrawal from the Presbyterian Church, but so far as we have been able to discover from the record, these two occasions were the first and only occasions, until 1904, in the history of the Cumberland Church, that any proposition had been considered by the assembly of the Cumberland Church for a union with either branch of the Presbyterian Church.

It thus appears that whether the General Assembly of the Cumberland Church had the authority to consider any proposition of union, or not, with any other denomination, under the laws of the church then existing, the assembly, in the years 1867 and 1873, was exercising at least the right of appointing committees for the consideration of the subject.

At such time, the confession for faith of the Cumberland Church, as written, existed in rather a crude form, and did not express as fully and clearly the position of the Cumberlands as was desired, for the reason that the same had been made up by taking the Westminister con-

fession and expunging therefrom words and sentences, and many of the boldy defined statements of doctrine objected to by the Cumberlands, so as to eliminate as nearly as possible all the features of hyper-Calvinism, and in lieu thereof, substituting and inserting corrected statements. (Rec., pp. 253-5.)

Soon thereafter, a movement began in the Cumberland Church for a restatement of both the Confession of Faith and of the constitution, with a view to a further elimination of the objectional features (to them) of hyper-Calvinism and its logical consequences remaining therein, and for a clear, concise, systematic statement of the doctrines and the position of the church, and with a view of defining the authority of the General Assembly, as to matters of union with other bodies, which resulted in the appointment of committees by the General Assembly in the year 1881 for that purpose, and in the adoption of the amended confession and constitution, in 1883, as it now exists, in accordance with the provisions of the constitution regulating amendments then in force. (Rec., pp. 253-5.)

The evident object of the amendents was to make the position of the Cumberland Church certain and stable, and to secure the permanency of the same as a separate jurisdiction. It will be noted that in both the proposed union with the Presbyterian Church in the United States (southern) and the one with the Presbyterian

Church in the United States of America, in 1867 and 1873, the suggestion (from the other side) was that the Cumberlands yield their organization. (Rec., pp. 50-1.)

Whatever may have been the authority of the General Assembly under the constitution of the church prior to 1883, as to unions with other bodies, whether it had unlimited power to unite or merger the church, or whether it had no power whatever is now immaterial. *If it had power, unlimited, to merge the church into another, such power by the amendment of* 1883, *was taken away from it, and it was limited thereafter, to the power of receiving, only, bodies of like faith and order under its jurisdiction. If it had no power in that regard, and power was sought to be given it, then by the amendment of* 1883, *it was given the power, only of receving under its jurisdiction, other bodies of like faith and order.*

In either view, the result is the same, the organization of the Cumberland Church as a separate and distinct body, with its jurisdiction, must continue. The assembly has no right to consider or make any contract of union that does not preserve intact the jurisdiction and organization of the church, or that permits the destruction of its identity. So that appellants say, that not only was there lack of authority in the General Assembly of the Cumberland Church, under its constitution, to enter into the scheme and alleged contract in question, but it was by

said constitution prohibited from so doing; and the act of the General Assembly in undertaking to enter into it, was in open defiance and in subversion of the constitution.

V.

Unconstitutionality further considered. The goverment of the Cumberland Church is representative in character. The General Assembly and other church courts are not the church. They are but constitutional agencies of the church. They do not possess the powers of sovereignty, bui only such powers as are granted them under the constitution. The sovereignty of the church is in the people, that is, the membership at large—official and non-official and ministerial, and the basic unit thereof is the local congregation or praticular church, as it is termed in the constitution.

> "A constitution is not the beginning of a community, nor the origin of private rights; it is not the fountain of law nor the incipient state of government; it is not the cause, but the consequence of personal and political freedom; it grants no rights to the people, but is a creature of their power, the instrument of their convenience." (Cooley's Const. Lim., p. 37.)

The church begins with the people who comprise the particular churches or local congregations. There can be no General Assembly or Synods, without Presbyteries, and Presbytery

without local congregations or particular churches, as they are termed in the constitution; and the membership of each particular or local church consists of "a number of professing Christians, voluntarily associated together."

> "A particular church consists of a number of professing Christians voluntarily associated together for divine worship and Godly living, agreeable to the Holy Scriptures and submitting to a certain form of government."

Its officers are the ministers in charge, the ruling elders and the deacons. Its jurisdiction is lodged in the church session, composed of the minister in charge and the ruling elders.

(Constitution, Sec. 4, Rec., p. 317.)

> "Each congregation elects its own elders and deacons from among its own members, and this is done at a congregational meeting, where any member has the right to submit a nomination." (Constitution, Sec. 45, Rec., p. 262.)
>
> "When a new Church is organized, it shall, through its Church session, apply to the Presbytery in the bounds of which it is located, in the following form." (Record, p. 265.)

Section 31 of the Constitution, at page 319 of the Record, among other powers belonging to the Presbyteries, recites, that it has power:

> "To unite or divide Churches, with the consent of a majority of the members thereof."

"The Church Session consists of the minister in charge and two or more ruling elders of a particular Church." (Constitution, Section 26, Rec., p. 318.)

"A Presbytery consists of all ordained ministers and one ruling elder from each Church, within a certain district." (Constitution, Section 29, Rec., p. 319.)

"The Synod consists of all the ministers and one ruling elder from each church in a district comprising at least three presbyteries." (Constitution, Section 35, Rec., p. 320.)

"The General Assembly is the highest court of the church, and represents in one body all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, constitutes the bond of union, peace, correspondence and mutual confidence among all its churches and courts." (Constitution, Section 40, Rec., p. 321.)

"It is necessary that the government of the church be exercised under some certain and definite form, and by various courts in regular gradation. These courts are denominated sessions, presbyteries, synods and general assemblies." (Constitution, Section 24, Rec., p. 258.)

"Church government implies the existence of church courts, vested with legislative, judicial and executive authority; and the Scriptures recognize such institutions, some of subordinate and some of superior authority, each having its own particular sphere of duties and

privileges in reference to matters ministerial and ecclesiastical, yet all subordinate to the same general design." (Confession of Faith, Section 110, Rec., p. 256.)

It is thus manifest that the courts of the Cumberland Church are not the Cumberland Church, they are merely the constitutional agencies for the government of the Cumberland Church through certain and definite forms, prescribed by the constitution itself. Government only became necessary when the church came into existence. Courts under the government set up were not appointed for the exercise of government in irresponsible and despotic forms but for the exercise of government in certain and definite forms: for the exercise of constitutional government, in form and manner prescribed by the church.

The membership constitutes and comprises the church, and upon the particular or local congregation as a basic unit, the source of power, a constitutional representative government has been constructed, for the preservation of the same as a church, and not for its destruction.

The general assembly, synods, presbyteries and sessions of the Cumberland Church, owe their existence and powers to the constitution. They are created by the express terms of the constitution, and derive their powers and the manner of exercise thereof from the express terms of the constitution. They have no existence of

power except through and under the terms of the constitution. Not so with the membership and congregation; their existence is not dependent upon the constitution, except in the sense that a constitution is a necessary consequency to their existence. In the formation of their association, a compact or agreement was necessarily required, which became their constitution; they produced the constitution, not the constitution them. By and through the constitution they granted certain of the powers of government, to the general assemblies, the synods, the presbyteries and the sessions, respectively, to be exercised by them within the church in certain and definite form.

The church can exist without the general assembly, but the general assembly cannot exist without the church. The church can exist without the presbytery, but not the presbytery without the church. The church can exist without the session, but not the session without the church.

The congregation elects its own officers and agents, and they are in no sense appointed or elected by the assembly. The congregation is the source of power and government. The general assembly, adjourning *sine die*, only abidcates its own functions and does not destroy the church. The church at once, through its representative system, elects and creates another assembly as its successor. The church and its congregation

remain with its membership and property, intact, as prior to the abdication of its assembly.

(a) *There is no inherent authority for the scheme.*

Being then a representative government, with the powers expressly restricted by the express provisions of the constitution to those granted, there is no room for the claim of inherent authority, made by respondents in behalf of the general assembly, to undertake and accomplish the actions by the scheme and alleged contract involved herein.

If the general assembly is a body of inherent authority, why have gone to the trouble of defiining its authority and expressly stating its powers in the written constitution? Why not have stopped with some unmistakable language asserting that it was to be recognized as a body with such power? Indeed, why have had a conconstitution at all, further than one providing for the general assembly? It can, by no conceivable rule of construction under the constitution as exists, be held to have any powers whatever, other than those expressly granted together with such as are necessary to the proper exercise thereof, and to render the same effective. If it ever had power extending to the scheme and contract in question, certainly such power was taken away from it by the constitution of 1883, when in express terms, its power with reference to unions with other denominations was ex-

hausted in the power to receive bodies of like faith and order under its jurisdiction. Thereafter, this comprised the sum total of all its powers as to unions. The inherent and granted powers in the same instrument are incompartible.

Having been created by the church as instrumentalities for its preservation and perpetuation through the exercise of certain explicitly defined powers, it is impossible that the church courts, or anyone or more of them, should originate within themselves or should by any means have inherent power to defeat the object of their creation, by the surrender and destruction of that church. This is what the scheme in question would result in, if allowed to become effective.

(b) *The scheme is not within the domain of legislative, judicial and executive powers.*

But say respondents, the general assembly and other church courts, had legislative, executive and judicial power, and that by reason of such fact, their authority to enter into the scheme and alleged contract of merger cannot be impeached. True, they have legislative, judicial and executive power, but they derive it from the constitution, and have only such as is granted them by the constitution; they can only legislate, judicially determine and enforce in those matters wherein the constitution gives them the right. The fact that they are given the

right to legislate as to certain matters, does not mean that they have the right to legislate as to every other matter that might arise. As said by Judge Cooley:

> "A written constitution is in every instance a limitation upon the powers of a government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers dormant in every nation, and are boundless in extent and incapable of definition."

Cooley's Const. Lim., p. 41.

The totality of these powers by reason of being in one body, is no greater than if they were distributed among three co-ordinate departments of government, as in the State and in the United States. It is the combined power of the judiciary, and the legislature and the executive of the State sufficient to authorize them, acting concurrently and conjointly, to dissolve these three departments of the State government forever, and to surrender its organization to and merge its institutions and citizenship and property into some other state. Can the three departments of the Federal Government do such a thing?

Adopting the same reasoning with respondents, would not the Congress of the United States be authorized to surrender itself and the other departments of government, with the

states, and to merger them into some foreign republic, because it has power to acquire foreign territory for the United States? Suppose, instead of acquiring the Phillipine Islands as was done, the same authorities at Washington had attempted to surrender themselves and the Federal Government, its institutions and people and property to the Kingdom of Spain, would anyone say that the power to make the acquisition for the United States included the power to make the surrender?

Most certainly they would not have the right to legislate or otherwise act in matters or in a manner prohibited to them, as they are with reference to the merging of the Cumberland Church into other organizations by section 43 of the constitution.

A matter of the destruction of a society or incorporated body, is not a matter of legislation. Legislation presupposes existence and organization. In order to legislate, there must be some organization in the name and right of which the power is to be exercised. No organization, no legislation. There is therefore no legislation exercised in the destruction of an organization. Whatever the exercise of such power may be, it is something else than legislation.

The legislative, judicial and executive authority granted is by the express mandates of the constitution required to be *subordinate to one general design.* (Rec., p. 256.)

This general design cannot be to destroy the organization meant to be served. The general design is the service of, the preservation and perpetuation of the organization in whose name the authority is granted, and in whose name the authority is to be exercised. All the powers conferred were to aid in carrying into effect the purposes for which the church was organized.

Boyles v. *Roberts*, 222 Mo., p. 692;
McCulloch v. *Maryland*, 4 Wheaton, 421.

Mr.Justic Chase in the case of *Calder* v. *Bull*, 3 Dallas, p. 387, said:

"I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State * * *. The purpose for which men enter into society will determine the nature and terms of the social compact; and they are the foundation of the legislative power; they will decide what are the principal objects of it; the nature and ends of the legislative power will limit the exercise of it. * * * There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative; power; as to authorize manifest injustice by a positive law; or to take away the security for personal liberty or of private property for the protection whereof the government was estab-

lished. An *act* of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."

(c) *The scheme and question is not within the amendatory power of the General Assembly of the Cumberland Church.*

It is contended that the General Assembly and the Presbyteries made the constitution in the first instance, and that by the authority of Section sixty (60) with reference to amendments, they have the power of amending the same, and that therefore they are constitution makers, and can make and unmake constitutions at their pleasure, and that therefore their action in entering into the scheme and alleged contract in question cannot be impeached.

But not so. The constitution is a matter of contract. It must be assented to by the parties whose fundamental law it is to become before it becomes such law. It must have been assented to by those constituting the Cumberland Church before it became the law of the church; and when assented to it became the constitution and law of each and every member of the church. In the giving of the assent the constitution is made. This assent in the first instance was manifested by those constituting the church at such time, and their acceptance of the same as their fundamental law. It had no validity,

force or effect, whatever, as a constitution or law, prior to such time. The acceptance of the same since such time, and by those coming into the church afterwards from time to time, and those now members of the Cumberland Church, is manifested, by their voluntary entrance into and connection with said church as members thereof. In such way the constitution was made, originally, and in such way is maintained as a constitution of the Cumberland Church. It is immaterial who framed it, originally, and as for that matter the record is silent and does not show; its makers were the people who accepted its provisions for their government as members of the church. It had no effect until then. And then it had all effect as a fundamental law of the church. It bound every portion and part thereof, official and non-official. It became the chart by which the church should be guided. None were above, but all were within it, and subject to its limitations. It, together with the Confession of Faith and other standards adopted at the same time and in connection therewith, became the charter, the terms and provisions of which constituted a trust, to which hundreds and thousands have in the century following, since eighteen hundred and ten (1810), subscribed, and for the propagation and maintenance of which have contributed millions of dollars.

If it be true that the general assembly are constitution makers and made the constitution, then the greater reason prevails for the strict-

ness of the rule that the terms of the constitution as made by them should prevail. Should they now, after having received and obtained all the donations and property for the purpose of the trust declared in such confession and for its protection in the use to which it was to be applied in its constitution, disregard the same and apply it to the use and purpose of another organization different from that for which it was in the first instance raised? Can they thus gather together great trust properties and then destroy the trust upon which it was acquired?

It is one of the fundamentals of the law of the land, that a trust must be preserved and devoted for the use for which it was raised. It cannot be diverted to some other use or purpose. It is one of the especial prerogatives and pleasures of a court of equity to prevent any destruction or diversion of the same and to see that it is applied in accordance with the terms of the original trust.

Beach on Injunctions, Art., 910, 915, 918.

True the general assembly and presbyteries of the Cumberland Church have the power to amend the constitution of that church. But this is not an inherent power. It is derived from the constitution, and they have only such power in such behalf as is granted. They have no right to change the constitution or Confession of Faith in any other manner than by amending, and they have no right to make an amendment

except in the manner provided by the constitution. This right is found in section sixty (60) of the constitution, (at page three hundred and twenty-one, (321) of the record.

Russie v. *Brazzelle*, 128 Mo., 107-8;
Prohibitory Amendment Cases, 24 Kansas, 706;
Boyles v. *Roberts*, 222 M., 613, l. c. 684;
Bear v. *Heasley*, 98 Mich., 279;
Schlichter v. *Keiter*, 156 Pa. St., 119.

But the power to amend does not include the power to destroy. The power of amendment was in subordination to the life of the society and church. It was given to aid in the up-building and preservation of the church, as an organization and not for its destruction. The power of amendment was given to be exercised so as to advance the interests of the church, and to promote its objects, and not for its destruction in identity in either doctrine or organization.

Russie v.*Brazzelle*, 128 M., 93, l. c. 115;
Boyles v. *Roberts*, 222 Mo., 613, l. c., 692.

Whatever the exercise of the power sought to be exercised by the scheme and alleged contract in question, by which the identity of the Cumberland Church, is destroyed and its membership and property undertaken to be merged into the Presbyterian Church, may be, it is not the exercise of the power of amendment. The power of amendment, like the legislative power,

is exhausted within the church, and there can be no exercise of such power in the act of destroying the church.

(d) *The Merger scheme could not be adopted by the General Assembly and Presbyteries, both representatives bodies, because the Constitution of the Church gave these bodies power to amend the Constitution. No power to adopt such a merger was delegated to them by the Constitution and no such manner of adopting such a scheme was provided for in the Constitution and it could only be done by the members.*

No Court has ever yet held that the proposition passed by the Cumberland General Assembly and submitted to and adopted by a majority of the presbyteries was an *amendment* of the Church Constitution. No provision of the Church Constitution provided for such a proceeding. No Court which has decided in favor of the alleged merger except the Supreme Court of Missouri in Hayes vs. Manning, 263 Mo. l. c. 32, has ever held that because the Constitution of the Cumberland Church provided that it might be *amended* by a two-third vote of the General Assembly, approved by a vote of a majority of the Presbyteries (themselves representatives bodies) that this merger proposition, for which there was no constitutional warrant, and by which the name, creed, government, members, property and everything belonging to the Church were turned over to and conveyed and merged into the Presbyterian Church, and the

identity of the Cumberland Church entirely lost and destroyed, could be accomplished by these representatives bodies in the same manner.

So to hold violates the fundamental principle inherent in every organization that, in the absence of a constitutional grant of power to the contrary, all power must vest in the individual units forming the organization, and that a grant of power to amend a constitution is not a grant of unlimited powers.

Even though it be conceded for the sake of argument that the Church had inherent power to destroy itself, to disband its organization, and to merge itself and its membership into the Presbyterian Church, yet, clearly, it has granted no such power or authority to the General Assembly and Presbyteries, which are both representatives bodies, with powers clearly defined and limited by the Constitution. It will not do to assume as apparently the Court below did, and as the Supreme Court of Missouri did,—that because the members of the Church, by their Constitution, granted power to the General Assembly and Presbyteries, to *amend* the Constitution in a prescribed manner, that it necessarily follows, that these representative bodies, with limited and prescribed power have authority to represent the members of the Church and adopt this merger scheme in the manner provided for amending the Constitution. It may well be assumed that the individual members of the Cumberland Church were

willing to delegate, as they did, the power to the General Assembly and the Presbyteries, to amend their constitution, but it does not follow that they were willing to delegate to, and did delegate, them the right to merge its members into another church and place of worship, destroy or extinguish the church itself, or merge it into another church. And the fact that not only the large majority of the individual members voting in the proposed merger opposed its adoption, but also that the large majority have remained loyal to the Cumberland Church since the attempted merger, and are endeavoring to release its property, demonstrates that they were not. So that, unless they have in terms and unconditionally granted to these bodies this fundamentally inherent power, certainly it rested with the individual members, and the attempted exercise of power by these representative bodies was *ultra vires* and void.

While it is not pretended in this case that the proposition of merger was an amendment to the Constitution of the Church, yet we can safely go a step farther. Even if these representative bodies had attempted thus to amend the Constitution and destroy this Church, they were without power so to do. It may be that the people of the United States have the inherent right and power to alter and abolish their Constitution and form of government whenever they may deem it necessary and have the right and possess the power to merge this government into the French Republic, and make this country a pro-

vince of that Republic. Yet, it will not be seriously contended that the people delegated any such power to the Congress and three-fourths of the State Legislatures by simply providing that the Constitution may be *amended* by a resolution passed by the Congress and adopted by the Legislatures of three-fourths of the States, nor that any such scheme or purpose, whether it be termed a merger with French Republic, or a union with it, could be accomplished in such manner. No such power and authority was ever delegated by the Constitution and the scheme itself would not be an *amendment* at all but would amount to an extinguishment of the Government itself and could only be done, if at all, by the people of the United States themselves.

It has been held that a provision in a State Constitution giving the General Assembly of the State power to amend the Constitution of the State, does not authorize them to repeal any of its provisions. (Eason vs. State, 11 Ark. 481; State vs. Cox, 8 Ark., 436.)

This must necessarily be true for if by amendment the provisions of a Constitution can be repealed by a body vested with power so to amend, then by this body the whole Constitution, or its most important functions, can be repealed.

The word "*amendment*" means to free from fault, a correction of a fault; the curing of a defect; alteration for the better; improvement. (Anderson's Law Dictionary, p. 55.) This idea

runs all through the law. To amend a statute is to repeal it. To *amend* a pleading is not to destroy it, but to change it, correct it and improve it.

(e) *The complainants' claim that the four specific steps taken were sufficent, is untenable.*

But it is contended in behalf of the scheme and alleged contract of union in question, that while the constitution does not in so many words confer upon the general assembly and presbyteries the power to make or enter into the same, that it does confer the power to take the specific steps involved in the formation of the merger or so-called union. In other words they can by indirection accomplish what they can not do directly, and what they are in fact by the constitution prohibited from doing.

Thus it is said that the specific steps involved are four in number:

First: A change in name;
Second: A change in the statement of the organic law;
Third: A change in the statement of the creed;
Fourth: A consolidation of the Cumberland Presbyterian membership with the Presbyterian membership.

But it will be noted that the scheme and question involved something different from the matter embraced in the four steps above set out. It

involved the destruction of the identity and jurisdiction of the Cumberland Church, as a separate organization, together with the enforced transfer of the same, its committees, bodies, trustees, agents, judicatories, ministers, membership and congregations with all the various properties belonging or held in trust for the use of any of said bodies, boards, judicatories, and congregations, to the Presbyterian Church, and under its jurisdiction and direction, and an abandonment of its confession of faith and organization.

If the power to change the name was conceded, this would not accomplish the destruction of the church as a distinct organization, neither would it merge it with its membership and propery into the Presbyterian Church. It would still be the same church with a different name.

A change in the statement of the organic law would not accomplish the destruction of the Cumberland Church as a distinct organization, neither would it merge it with its membership and congregations and other property into the Presbyterian Church. The changed organic law, would if within the proper exercise of the amendatory power, simply become tne new or changed and amended law of the same organization, the same Cumberland Church, as it existed prior to the change or amendment; if beyond the proper exercise of the amendatory power, it would be non-effective for any purpose. The adoption of an organic law, framed word for

word after the organic law of the Presbyterian Church, by the Cumberland Church, would not make it a part of the Presbyterian Church. It would simply be adopting a like organic law to that of the Presbyterian Church for its government. An organic law so adopted, would have no force as an organic law, save as the organic law of the Cumberland Church.

A change in the statement of the creed would not accomplish the destruction of the Cumberland Church as a distinct organization; or merge it with its membership and congregational and other property into the Presbyterian Church. The changed creed, would if within the proper exercise of the amendatory power, simply become the new or changed and amended creed of the same organization, the same Cumberland Church, as it existed prior to the change or amendment; if beyond the proper exercise of the amendatory power, it would be non-effective for any purpose. The adoption of a creed framed word for word after the creed of the Presbyterian Church, by the Cumberland Church, would not make it a part of the Presbyterian Church. It would simply be adopting the same or like creed to that of the Presbyterian Church, for its creed so adopted would have no effect or force as a creed, except as the creed of the Cumberland Church.

Besides all this, there was no change or amendment to either the creed or the organic law of the Cumberland Church. There was no

amendment formulated or submitted. It was simply an abandonment of the church creed and the organization.

The consolidation of the Cumberland Presbyterian membership by the general assembly, upon its own motion, with the membership of the Presbyterian Church, is no where authorized by the constitution. As to whether a Cumberland Presbyterian shall become a member of Presbyterian Church, is a personal right, belonging to such member himself. No man can be compelled to become a member of or support any church organization. He may voluntarily do so, but he can not be coerced into doing so, or made a member thereof without his personal consent. Becoming a member of the Presbyterian Church or any other church, is a matter of contract, and before one can be said to become a member thereof, he must personally have consented to the contract of membership. This is fundamental law. This is a matter of conscience.

Konta v. *Exchange* 189 Mo., 26.

The whole scheme, considered as four (4) specific steps, or otherwise, is under the ban of the constitution of the church, and likewise of the law of the land. It involves the destruction of both personal and property rights. No power or authority is given for the same in the constitution of the church, but on the contrary it is

prohibited thereby. And in addition the alleged specific steps were never taken.

The local congregations within the Cumberland Church can not be merged the one into the other without the consent of the membership.

The general assembly nor presbytery, nor both combined, have any authority, except with the consent of a majority of the members thereof, to merge one congregation of the Cumberland Church into another congregation thereof.

Section thirty-one (31) of the constitution at page 319 of the record, among other powers belonging to the presbyteries, recites, that it has power, "to unite or divide churches, with the consent of a majority of the members thereof."

This fact acknowledges the sovereignty of the local congregation and the membership thereof in the Cumberland Church. The fact that the presbytery is given the power to merge congregations with the consent of a majority of the members thereof, is a prohibition of any power to merge them otherwise.

How then can it be asserted that they have such greater power, as enables them to merge the local congregation into the local congregation of the Presbyterian Church? If the power of merger of one congregation into another within the same church, rests upon the consent of the membership, why should not the power to

merge the membership of one congregation of the church into the membership of a congregation of the Presbyterian Church, rest upon exactly the same consent? We confidently assert that it does, and that no power exists to merge the membership and property of the Cumberland Church into the membership and jurisdiction of the Presbyterian Church, except as the membership consents and agrees.

We do not contend that the membership of the Cumberland Presbyterian Church has a right to a direct vote on any matter, which by the consent of the church has been delegated to its general assembly and presbyteries and other courts; with such mattrs those bodies must act in a representatives capacity. But our contention is, that the power to destroy themselves and the church, to pass its ministers and members and property into another church, as attempted by the present scheme, was not by the constitution conferred on those bodies or any of them; and therefore that the church could be dissolved and merged into another organization, only by the consent of the membership as such.

It may be said that the Cumberland Church, comprising all the membership, had an inherent power, by unanimous consent, to dissolve and extinguish its organization and pass its membership into another church, with the latter's consent. But it by no means follows that the general assembly and presbytery, by merger on vote or otherwise, had power to accomp-

lish such a result. Its tribunals are not the church. They are only instrumentalities of the church, created for the church for its own advantage and perpetuation and possessing only such powers as have been delegated to them in the constitution.

Judge Story says:

"No state, as such, that is, the body politic, as it was actually constituted, had any power to establish and contract for the establishment of any new government of the people thereof, or to delegate the powers of the government in whole or part to any other sovereignty. The state governments were framed by the people to administer the state constitutions, such as they were, and not to transfer the administration thereof to any other persons or sovereignty. They had no authority to enter into any compact, or contract for such a purpose. It is nowhere given or implied in the state constitution; and consequently if actually entered into would not add any obligatory force. The people and the people alone, in their original sovereign capacity, had a right to change their form of government, to enter into a compact, and to transfer any sovereignty to the national government. And the states never, in fact, did, their political capacity, as contradistinguished from the people thereof, ratify the constitution. They were not called upon to do it by Congress; and were not contemplated as essential to give validity to it."

Story Constitution, Section 362.

"The powers delegated to the state sovereignites were to be exercised by themselves, not by a distinct and independent sovereignity, created by themselves. To the formation of a league, such as was the Federation, the state sovereignites were certainly competent, but when in 'order to form a more perfect union,' is was deemed necessary to change this alliance into an effective government possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."

McCulloch v. *State of Md.*, 4 Wheaton, 403.

VI.

The laws of the Cumberland Presbyterian Church and the powers of its General Assembly thereunder are not the same as the laws of the Presbyterian Church, U. S. A., and other Presbyterian Church bodies.

It is contended by respondents in effect that the Cumberland Church derived its system of government from the Presbyterian Church, U. S. A., and other Presbyterian Church bodies, and that its laws are the same. That in adopting the same the Cumberlands adopted the same construction that had hitherto been placed upon its various provisions, by the Presbyterian

Church and other Presbyterian Church bodies. Assuming the action of the General Assemblies of the Presbyterian Church, and other Presbyterian Church bodies, in making a number of unions of one kind and another, between their respective churches, to be a construction by those bodies of their authority under the laws of each to make such unions, they argue that therefore the Cumberland General Assembly under the same construction, which it must have adopted, has the authority to merge the Cumberland Church into the Presbyterian Church, as is undertaken to be done by the scheme in question here.

But such is not the fact. The laws of the two churches are not the same, at least so far as the powers of the General Assemblies are concerned, as well as in other essential and material particulars.

The powers of the General Assembly of the Presbyterian Church, U. S. A., are thus enumerated in the constitution of that church:

"IV. The General Assembly shall receive and issue all appeals, complaints and references, that affect the doctrine or constitution of the church and are regularly brought before it from the inferior judicatories, provided that cases may be transmitted to the permanent judicial commission of the general assembly as prescribed in the Book of Discipline. The general assembly shall review the records

of every synod and approve or censure them; it shall give its advice and instruction, in all cases submitted to it, in conformity with the constitution of the church; and it shall constitute the bond of union, peace, correspondence and mutual confidence among all our churches.

"V. To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproving, warning, or bearing testimony against error in doctrine, or immortality in practice, in any church, presbytery or synod; of erecting new synods when it may be judged necessary; of superintending the concerns of the whole church; *of corresponding with foreign churches on such terms as may be agreed upon by the Assembly and the corresponding body;* of suppressing schismatical contentions or disputations; and in general of recommending and attempting reformation of manners, and the promotion of charity, truth and holiness through all the churches under their care." (Rec., pp. 242-3.)

The powers of the General Assembly of the Cumberland Church are thus stated in the constitution of its church:

"The general assembly shall have power to receive and decide all appeals, references and complaints, regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immortality in practice,

injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction, in conformity with the government of the church, in all cases submitted to it; to review the records of the synods; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to create, divide or dissolve synods; to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rule provided therefor; *to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church;* to authorize synods and presbyteries to exercise similar powers in receiving bodies suited to become constitutents of those courts, and lying within the geographical bounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and in general to recommend measures for the promotion of charity, truth and holiness throughout all the churches under its care." (Rec., pp. 261-2.)

The powers of the assemblies of other Presbyterian bodies do not appear in the record.

The Presbyterian Church has never, in any of the arrangements which it has entered into with other bodies, construed the authority of its general assembly under the laws of that church to include a *merger* of the Presbyterian organization, membership and property into the other body. It has simply furnished a construction at best, that its general assembly had authority to *receive* other bodies under its jurisdiction.

So that if it is construction of authority by the Presbyterian Church in favor of a merger of its organization that is relied upon for the General Assembly of the Cumberland Church to merge its organization and membership into the Presbyterian Church, there is none.

If it is construction of authority to receive other bodies under its jurisdiction, that is relied upon to validate this scheme, the same is insufficient—and besides the Cumberland has power to receive, not by derivation from construction, but from the express provisions of its own constitution. But the power to receive does not include the power to merge—but upon the other hand, as before explained, the manner of its grant excludes and prohibits the power to merge.

But suppose that the Presbyterian Assembly had repeatedly construed its authority under the powers granted it to include a merger of the Presbyterian Church into the body with which it was in correspondence, by repeated mergers of that body, how would that become the law of

the Cumberland Church? The Cumberland Church has made its own law upon this very question of union, and it is different from the provision made by the Presbyterian Church in its laws. In other words it has not the same law with the Presbyterian Church and therefore is not concerned with the Presbyterian law or the construction which may now be or has heretofore been place thereon, by that body. It is at least essential to the proposition contended for by complainants that the laws of the two bodies must have been the same, before it can be held that the organization deriving its laws from the other, must be held to have adopted with them the same construction placed thereon by the organization from which they were derived. In adopting the same system of government as other bodies, that is a system of representative government, the Cumberland Church was not required to adopt and have the same laws. It had the privilege of making different laws. And in this instance it did make a different law as to the power of its General Assembly. It now but asks that the same right be accorded it—as is accorded all other organizations, that is, the right to have the benefit of its own laws and the right to be governed and controlled thereby.

VII.

Even if the scheme and alleged contract herein comtemplated and involved could properly come within the amendatory powers of the General Assembly, still no amendment was ever made to the constitution of the Cumberland

Church authorizing it, and the entire scheme was taken up and attempted to be put through, while the constitution prohibited such action upon the part of the General Assembly. There was no authority in the General Assembly to undertake the negotiations involved and no authority to entertain OR SUBMIT SUCH A PROPOSITION, BUT ON THE CONTRARY, IT WAS PROHIBITED THEREFROM.

At the time it appointed its committee on union to confer with a like committee from the Presbyterian Church, in 1903. (Rec., p. 60), which joint committee formulated and reported back the alleged plan and basis of union to the respective assemblies, in 1904, the state of the law in the Cumberland Church was, that the assembly was prohibited from entertaining such scheme, and it could only have authority, in any event, to entertain such a scheme, by amending the constitution in the manner provided in the constitution, so as to remove the prohibition and grant the right (if within the proper exercise of the amendatory power).

No amendment was asked or made, but the General Assembly proceeded openly—not only without authority, but in the face of the prohibition of such authority. True, also, when they received and adopted the joint report of the committee in 1904, and when they directed the submission of the alleged basis of union, incorporated in such report, to the presbyteries of the church, the constitution of the church was as

amended, in 1883, and gave no authority for the entertainment, consideration or adoption of such report, or plan or basis of union therein contained, or for the submission of said basis of the union to the presbyteries, but upon the other hand, prohibited such action. (Rec., pp. 67-70.)

It was necessary before taking any steps whatever, in the proceedings for said scheme, to have first amended the constitution of the church in the manner therein provided for such amendment, so as to have removed the prohibition, and to have granted the right, (if within the proper exercise of the amendatory power), for the entertainment and consideration of the same, and for the submission of the alleged basis to the presbyteries. This was not done. No amendment was asked or made, but the assembly proceeded openly, not only without authority, but in the face of the prohibition of such authority, and adopted said report in 1904, and without authority and in the face of the same prohibition, submitted to the Presbyteries the alleged basis of union. (Rec., pp. 67-70.) Its action in such regard was *ultra vires* and void.

This view was taken by the Supreme Court of the State of Missouri, in the case of *Boyles* v. *Roberts*, 222 Mo. p. 613, l. c. 681. It says:

> "But to our minds there is another phase of this case to be emphasized. We are firmly of the opinion, that there was no power in the General Assembly of the Cumberland Church

to *submit* the union. * * * The General Assembly is not the Church, neither is any other minor judicatory. They are but the constitutional agents of the church, and whilst they can amend the constitution as well as the creed, yet until it is amended in strict compliance with the limiting terms of the constitution, the existing organic law is alike binding upon the General Assembly and the humblest member. So that we say the attempted method of union was in direct violation of the constitution and void. In other words, until the Church has amended section 43 of its constitution, it cannot form a union with any other ecclesiastical body, except to receive such other body under its own jurisdiction."

VIII.

The adoption of the plan of union as reported by the Joint Committee, and the submission of the basis of union as therein provided to the presbyteries, and the action of the presbyteries thereon, did not effectuate an amendment of the constitution of the Cumberland Church and thereby authorize the merger of that church into the Presbyterian Church in the United States of America.

In the first place, as shown elsewhere in this brief, all the acts and proceedings in the General Assembly of the Cumberland Church, beginning with the appointment of its committee of union to confer jointly with a like committee from the Presbyterian Church to take up this

scheme of merger, including the adoption of the alleged plan of union and the joint report, and the submission of the alleged basis of union and all proceedings subsequent thereto, were *ultra vires* and void, because at the time such proceedings were had and entertained in such body, there was no authority in the general assembly to entertain the same, and because further, the general assembly was at such time prohibited by the constitution from entertaining or indulging in any of the same.

Section 60 of the constitution of the Cumberland Church, which provides for amendments, is as follows:

> "Upon the recommendation of the General Assembly, at a stated meeting, by a two-third vote of the members thereof voting thereon, the Confession of Faith, catechism, constitution and rules of discipline may be amended or changed, when a majority of the Presbyteries, upon the same being transmitted for their action, shall approve thereof."

This section is the only provision of the constitution of the Cumberland Church for amendments to the Confession of Faith, catechism, constitution and rules of discipline of the church, and an amendment to the constitution, under the provisions of this section, was not in the mind of the general assembly in submitting the basis of union to the presbyteries, nor in the mind of the presbyteries in voting for the approval or

disapproval. What was in contemplation of those forwarding the matter, was the destruction of the constitution, and not its amendment; for, in the even of the approval of the basis of union by a majority of the presbyteries, the constitution and Confession of Faith of the Cumberland Church were to cease and forever end; the name Cumberland was to be absorbed by the name Presbyterian; and so nothing would remain of the Cumberland Church for an amendment or other constitution to act upon. There was to be nothing left of the Cumberland Church to which a constitution would apply or over which a constitution might be erected.

"Amendment," from the Latin verb, *Emendare*, to free from fault, means a correction of a fault; the curing of a defect; alteration for the better; improvement. (Anderson's Dictionary of the Law, p. 55.)

And besides amendments to constitutions are made in pursuance of directions contained in the instruments themselves.

> *Prohibitory amendment cases*, 24 Kas., 709;
> *In re Constitutional Convention*, 14 R. I., 651;
> *Boyles* v. *Roberts*, 222 Mo., 613;
> *Landrith* v. *Hudgins*, 121 Tenn. 680.

The mode provided in the constitution for its amendment is the only method in which it can

be amended. It cannot be changed except by pursuing the method provided. The ordinary rule is applied here with strictness, that where power is given to it and in a particular way, the affirmative method excludes and prohibits all other methods. The only manner of changing the Cumberland constitution is by amendment, and the only manner of amendment is provided by section 60 of the constitution. In this case nothing was formulated as an amendment. Nothing was proposed as an amendment. Nothing was proposed to be amended. Nothing was submitted as an amendment. Nothing was voted upon as an amendment. It was not a question of amendment. It was simply a question of the abandonment of the Cumberland Presbyterian Church and organization, and the merger of it into the Presbyterian Church.

Smith v. *Stephens*, 10 Wall 326;
Bunn v. *Gorgas*, 41 Pa., 446.
White v. *Brownnell*, 2 Daily, 329.
Bear v. *Heasley*, 98 Mich., 279.
Lamm v. *Cane*, 14 L. R. A., 538.
Philomath v. *Wyatt*, 26 L. R. A., 78.
Russie v. *Brazzelle*, 128 Mo. l. c., 107.
Boyles v. *Roberts*, 222 Mo., 613.
Landrith v. *Hudgins*, 121 Henn., 680.

The Templeton resolution adopting the plan of union and submitting the basis of union, is not amendatory in form, nature, or language. It mentions in no way either the constitution or the Confession of Faith of the church, for the

purpose of amendment or otherwise. It does not express definitely and positively the judgment of the general assembly in favor of an amendment or change in the laws of the church, and besides the submission proposed to be made to the presbyteries *is conditional,* being made to depend upon the future action of another body and official notification of that action. Legislation cannot be accomplished in this way.

Such, admittedly, was not the intention here; for, as well observed, it was not the purpose to go further with the matter, unless and until the other assembly should take the same action, and if it should never do so, the Cumberland Church was expected to remain and be where and as it was before, in all respects, and in nothing changed by what its general assembly had then done. *So that when its commissioners returned to their homes in* 1904, *they did not know and could not know, whether they had passed a law or not.*

To be effective as an amendment, the written paper, proposition, or resolution so intended, must be unconditional in its terms and must recite or exhibit the exact and entire language of the intended change in *haec verba;* and before submission to the presbyteries for their action, must have the distinct and positive approval of the general assembly. None of these requirements are found in this case.

To further demonstrate the fact that the ac-

tion taken by the General Assembly and the Presbyteries of the Cumberland Church in reference to the so-called union and merger was not intended as an amendment of any of the existing laws of that church, it is only necessary to call attention to the fact that the General Assembly and Presbyteries of the Presbyterian Church took exactly the same action. It submitted the exact same matter to its presbyteries. Of course the latter church did not contemplate or intend any change in its own laws; and yet it took exactly the same action as was taken by the Cumberland Church. Hence, if an amendment or change was wrought in the laws of the one church, the same amendment or change was likewise wrought in those of the other church; and yet the laws of the Presbyterian Church are left exactly as they were before.

IX.

The scheme and alleged contract are void and of no effect, also, because the entire plan was not submitted to the Presbyteries.

If there had been no other legal infirmity in the scheme, the action taken would still be void because the joint report of 1904, and the plan therein contained, provided that *only a part* of the plan of union should be submitted to the presbyteries of the Cumberland Presbyterian Church, and only a part of it was in fact submitted to the presbyteries. The essential part thereof, providing for the change of name, surrender of the jurisdiction of the church and the

merging of its membership, property and corporate rights into the Presbyterian Church, the part thereof affecting the temporal organization of the church, the constitution of the church, was not submitted to the presbyteries at all, for their approval or disapproval, but was reserved wholly to the assembly and rests wholly upon the authority of the assembly. The only part thereof submitted to the presbyteries at all, was that part which had reference to the spiritual church and the doctrines and creed thereof.

The church is comprised of two bodies, the one the invisible and spiritual,the other the temporal and corporate. The one relates to the doctrine and worship, the other to the organization.

Westminster Pres. Ch. v. *Trustees*, 211 N. Y., 214.

"The joint report of union" comprised three objects, namely:

FIRST, Plan or re-union and union of the two churches;

SECOND, Concurrent declarations;

THIRD, Recommendations.

The first of these, the "plan," has four sections. The first section requires the surrender of the name, organization, and property of the Cumberland Church to the Presbyterian Church in the United States of America. The language of the first section is as follows:

"The Presbyterian Church in the United

States of America, whose General Assembly met in the Emmanuel Church, Los Angeles, Cal., May 21st, 1903, and the Cumberland Presbyterian Church, whose General Assembly met in the first Cumberland Presbyterian Church, Nashville, Tenn., May 21st, 1903, shall be united as one church, under the name and style of the Presbyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess."

That section, though contemplating the complete dissolution and merger of the Cumberland Church, was not submitted to the presbyteries.

The second section deals with the doctrine and faith only as follows:

SECOND. "The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and all its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice."

That section and that alone was submitted to the presbyteries.

The manner and matter of submission are distinctly prescribed and defined in the third section, as follows:

THIRD. "Each of the assemblies shall submit the foregoing basis of union to its presbyteries, which shall be required to meet on or before April 30, 1905, to express their approval or disapproval of the same, by a categorical answer to this questions:

'Do you approve of the reunion and union of the Presbyterian Church in the United States of America, and the Cumberland Presbyterian Church, on the following basis: The Union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testament shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice.' "

The question thus formulated in the third section was submitted to the Presbyteries of the Cumberland Church. It will be noted that no reference whatever is made to section 1, or the subject-matter thereof.

The fourth and last section of the plan directs a report and count of the votes of the presbyteries. (Rec.,p.303.)

The preamble of the joint report of 1906 recites the fact that the second section of the plan and the joint report of 1904, was submitted to the presbyteries as therein directed. (Rec., pp. 37-8.)

Whatever view may be taken of the scheme and alleged contract of union, whether legal or illegal, we insist that in any view of its legality, is was at least indispensable to the valid surrender of the name, organization and property of the Cumberland Church, and the merger of its membership and property into another Church, that the provisions for such a resolution must first be submitted to the Presbyteries or membership and approved by them.

In *Landrith* v. *Hudgins*, 121 Tenn., p. 600, the Supreme Court of the State of Tennessee, touching this proposition, said:

"The only part of the plan of union submitted to the Presbyteries of the Cumberland Presbyterian Church was embraced in the following question, to which they were required to return a categorical answer to either approval or disapproval:

'Do you approve of the Reunion and Union of the Presbyterian Church in the United States of America, and the Cumberland Presbyterian Church on the following basis: The Union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church as revised in 1903, and of its other ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice.'

"This embraced only the matter of doctrine

which fell within the second subdivision of the plan.

"The first subdivision of the plan which involved the surrender of the name and organization of the Cumberland Presbyterian Church was not submitted to the Presbyteries; it was left to be determined and was determined by the General Assemblies of the two Churches; or rather by the General Assembly of the Cumberland Presbyterian Church. The question did not arise in the Presbyterian Church, because under the plan of union, that Church was to retain both its name and organization.

"Did the General Assembly of the Cumberland Presbyterian Church, without submitting the matter to the Presbyteries, have the power to surrender the name and organization of the Church, and dissolve it, by consenting to its absorption into another organization?

* * *

"At all events, the people of the Church were entitled to have the whole question submittd to the Presbyteries. We do not think that the General Assembly had power to determine this question without a submission to the Presbyteries; there is nothing in any part of the constitution of the Church which confers this power upon the Assembly, and by section 25, that body is denied all powers not expressly conferred."

Likewise, the Supreme Court of Missouri, in

the case of *Boyles* v. *Roberts*, reported in 222 Mo., p. 613, l. c. 680, said:

> "The General Assembly of the Cumberland Presbyterian Church, in 1906, by its action undertook to surrender not only the creed and doctrine of the Church, but likewise to surrender its name, organization and property and this without a vote of the Presbyteries. This cannot be done under the Cumberland constitution. The act was *ultra vires* and void."

It is worthy of remark in passing, that the courts upholding the scheme have entirely overlooked the fact that only a part of the plan was submitted to the Presbyteries of the Cumberland Presbyterian Church, and that the proposed surrender of the name, organization and property, and the merger of the membership and property into the Presbyterian Church rested alone upon the action and authority of the General Assembly.

The Supreme Court of California, though overlooking the omission, otherwise did say in effect that if the surrender of the name should have been submitted, it was included in the question submitted, and if not so included, that the name might yet be changed. The failure to submit the proposed surrender of the organization and property was overlooked by that court, as by the others which overlooked the omission as to the name in addition.

The surrender of the organization means the destruction of the Cumberland Presbyterian Church as an ecclesiastical entity.

X.

The action of the majority of the Commissioners in the General Assembly, in entertaining the scheme of merger and in undertaking to declare it finally effective and operative, and in declaring the General Assembly adjourned sine die without naming the time and place for the next meeting, was in excess of their authority and void.

The constitution of the Cumberland Church, under the 41st section thereof, provides:

> "The General Assembly shall meet as often as once every two years, at such time and place as may have been determined at its preceeding meeting, and shall consist of commissioners of the presbyteries in the following proportion; every presbytery shall be entitled to send one minister and one ruling elder; but if it consists of eighteen or more ministerial members, it may send an additional minister and ruling elder." (Rec., p. 321.)

Each commissioner to the General Assembly must bear a commission in writing, which commission directs that he repair to the General Assembly, in behalf of the presbytery represented:

> "To consult, vote and determine on all

things that may come before the same, according to the principles of the government of the Cumberland Presbyterian Church, and the word of God; and of their diligence herein they are to render an account upon their return." (General Regulations, Cum. Church, Sec. 11, Rec., p. 323.)

Both the constitution of the Cumberland Church, and the commissions which they were required to bear, were thus violated by their action in undertaking to adjourn the Assembly without naming the time and place for the next meeting.

Lord Robertson, in an opinion by him in the Free Church of Scotland Cases, referring to the duty of the commissioners under their commissions and the law of the church, said:

"The General Assembly is made up of commissioners, and each commission is in writing. By immemorial custom, this commission bears that the commissioners are to repair to the Assembly, 'and there to consult, vote and determine, in all matters that come before them, to the glory of God and the good of the Church according to the word of God, the confession of faith, and agreeably to the constitution of the Church as they shall be answerable.'

"Now, I must own my inability to see how it would fall within this mandate, to do away with, or help to do away with, the Confession of Faith as a standard of the Free Church;

and I mention this as testing the argument for the unlimited power of the General Assembly under the Barrier Act."

Appeal Cases, Law Rep., 1904, p. 687.

To say that they delegated the authority to name the time and place of the next meeting to the Assembly of the Presbyterian Church, does not meet the requirement of the constitution of the Cumberland Church or of their commissions. It has been held that such a body may delegate the power under appropriate legal provisions to certain boards or officials of the particular society involved, but never that such authority might be delegated to some other society.

Aurecher v. *Yerger*, 90 Iowa, 558;
Kreuher v. *Shirley*, 163 Pa., 534.

XI.

The minority of the Commissioners in the Assembly of 1906 *acted in accordance with their commissions, and with the law of the Church, and in so doing perpetuated the existence of the Cumberland Presbyterian Church and preserved its organization intact.*

Section 42 of the constitution of the Cumberland Church provides that the General Assembly may be constituted by 20 or more commissioners.

"Any twenty or more of these commission

ers, at least ten of whom shall be ministers, being met on the day and place appointed, shall be a quorum for the transaction of business." (Rec., p. 321.)

It is one of the fundamentals of the law of unincorporated societies, that neither the majority of the membership, or any other portion thereof less than the entire membership, so long as a sufficient number thereof remain to maintain the society and transact its business, can destroy the existence of the society. The same rule is applicable to church societies.

Enc. Law and Procedure, 4 Vol. 315;
Burk v. *Roper*, 79 Ala., 138;
White v. *Brownnell*, 3 Abb. P. R. N. S. (N. Y.) 318;
Thomas v. *Ellmaker*, 1 *Pars. Eq. cases*, (Pa.) 98;
Kenney v. *New England Protective Association*, 37 Vermont, 64;
Troy Iron Factory v, *Corning*, 45 Barb. (N. Y.) 231.
Schiller Commandery v. *Jennichen*, 116 Mich., 129;
St. Mary's Benevolent Association, 64 New Hamp., 213.

The sole rule which can be laid down appears to be that an association is to be regarded as dissolved only when the objects of the society have been entirely abandoned *and the power to resume business does not exist.*

Enc. Law and Procedure, 4 Vol., p. 315-316;
Burke v. *Roper*, 79 Ala., 138;
Butterfield v. *Beardsley*, 28 Mich., 412;
Grand Lodge K. P. v. *Germania Lodge*, 56 N. J. Equity, 63;
Koehler v. *Brown*, 2 Daly (N. Y.) 78;
Abels v. *McKeen*, 18 N. J. Equity, 462.

Upon the action of the majority of the commissioners in the Assembly of 1906, in voting the adoption of the scheme and alleged contract of Union, a minority of 100 commissioners in said Assembly filed a written protest, (Rec., pp. 112-3) and continued the session of the General Assembly the same day; elected the necessary officers, rescinded the attempted *sine die* adjournment, and a declaration previously made by the departing moderator, transacted unfinished business, and adjourned in due form as required by the constitution, to meet on the third Thursday in May, 1907, at Dickson, Tennessee (Rec., pp. 286-8).

The majority commissioners terminated their commissions and their further connection with the General Assembly of the Cumberland Church by their action in 1906, and thereupon the minority, retaining their commissions, constituted the General Assembly of the Cumberland Church. In 1907, the General Assembly again met at the time and place pursuant to adjournment and has met annually pursuant to

previous adjournments, since such time (Rec., 288-300).

And if the minority had not thus maintained organization of the General Assembly, the membership of the church comprising the congregations, and Presbyteries thereof, could have resupplied the same. The majority commissioners in 1906, simply abdicated their positions as commissioners and their connection with the General Assembly and the church. Their action could not affect such portion of the church as did not go with or follow them; so long as sufficient of the church remained to continue the organization and purposes of the church it could not be destroyed or dissolved.

XII.

To construe and pass upon the meaning of the constitution of the Church is not an ecclesiastical but a civil question. The constitutions of ecclesiastical bodies are civil contracts between the members thereof, and passing upon questions of property rights, arising out of the violation of its terms, civil courts apply those established rules that govern in other civil controversies.

In *Bear* v. *Heasley*, 98 *Michigan*, 279, the court says:

"The relations between the members of this association is one of contract, and the Confession of Faith and constitution constitute the

terms of the agreement which are binding upon all."

In *Boyles* v. *Roberts*, 222 Mo., l. c. 677, the court says:

"The constitution is the contract of association in churches and all unincorporated societies. It is binding upon all portions of the church, as well as all judicatories thereof. It is the supreme law of the church, and must be adhered to by every part thereof. To pass upon the meaning of such instrument is not dealing with ecclesiastical questions at all, but only determining the meaning of an organic agreement or contract. That these organizations cannot go beyond their constitutional powers is amply shown by the cases."

Watson v. *Avery*, 2 Bush., 332;
Bunn v. *Gorgas*, 41 Pa. St., 446;
Krecker v. *Shirley*, 163 Pa. St., 534;
Gartin v. *Penick*, 5 Bush., 110;
Deaderick v. *Lampson*, 11 Heisk., 523;
Presbyterian Church v. *Wilson*, 14 Bush., 278;
Hyder v. *Woods*, 2 Sawy., 655, 94 U. S., 523;
White v. *Brownell*, 2 Daly, 239.

In *White* v. *Brownell*, the court says:

"As the association is not organized in pursuance of any statute, nor the terms of mem-

bership fixed by the principle of the common law, it follows that the agreement which the members made among themselves on the subject, must establish and determine the rights of the parties on the subject. The constitution of the association and its laws, agreed upon by the members, contain all the stipulations of the parties, and is a law which should govern. The members have established a law for themselves. * * * The court must regard the constitution and laws of this board as the contract by which all members are bound. The court cannot make any other contract for the parties than they have solemnly made for themselves."

In *Gartin* v. *Penick*, 5 Bush., 110, the court says:

"But the organic law of the church, like that of the state, being a contract between all the parties to it, and the members of the church being entitled, as citizens, to the protection of the paramount constitution of the state against all wrongful breaches of their contracts, the civil tribunals must have some rightful jurisdiction over the constitution of the church as a contract not less obligatory than any other contract between competent parties; and those tribunals must have jurisdiction also to protect a member of the church against unconstitutional invasion of his fundamental right to personal liberty and security, whenever attempted by his ecclesiasti-

cal government inconsistently with either its own constitution or that of the political government."

Any other view would not leave the law of the land supreme. The judicators of the church become sovereign, and not subject to the law of the land. The law of the land must be supreme.

The civil government must be sovereign.

The right of persons to voluntarily associate themselves in an unincorporated society under our laws is of universal recognition, and its exercise is limited by the requirement alone, that the object and purpose of the same, and the contract of membership and rules for its government, be not inconsistent with the laws of the land. The same rule applies to churches.

As said by the Supreme Court of Missouri in the case of *Prickett* v. *Wells*, 117 Mo., 502, l. c. 505:

"The people of that society, in the exercise of their religious liberty, had the undoubted right to adopt rules for their own church government, if not *inconsistent* with the *constitution and laws of the land*."

The church sovereignty then is, and must be, subject to the sovereignty of the civil government, and if the fundamental contract of association or membership in a church or other un-

incorporated society, is for the purpose of defining and establishing the rights of the members thereof, then how is it to escape construction in the civil courts of the land, according to the same rules for the construction of other contracts, and the rights of the membership thus definitely ascertained; and if the courts of the society do not give the proper construction under the laws of the land to such contract and the rights of the parties thereunder, but violate the member's civil right as a member of the society under said contract, what becomes of his right as a citizen of the country, to have the terms of his fundamental contract as a member of the society observed and his right thereunder protected, if the civil court refuses to consider the same? Is not the civil right of the member of such society, for the protection of which the civil government is organized and maintained, nullified thereby? It is a civil right of the member to have the church or society judicatory give effect to his contract, and if it does not do so, is not the civil right violated, and has he not the right to appeal to the civil court for redress and correction thereof? It not, then the law of the land is not sovereign and supreme. To pass upon the meaning of a contract is not an ecclesiastical question, but a civil question.

XIII.

No contrary contemporaneous construction.

There has been no contemporaneous or practical construction of the constitution of the Cumberland Church on the subject of union and

merger. Only tentative preliminaries, such as the appointment of committees, were made prior to the year 1903; no committee report was ever made by a committee appointed in its behalf recommending a scheme which in the remotest degree ever contemplated a merger of the Cumberland Presbyterian Church into another denomination, with a surrender of its name, organization, doctrine and polity, membership and property, as has been attempted in the present instance, nor was ever any such plan adopted by the General Assembly.

The Cumberland Presbyterian Church has no doubt been willing at all times "to receive into its jurisdiction other religious bodies that have the authority and might be willing to accept its Confession of Faith and government, or to enter upon any feasible plan of co-operation and fellowship that did not involve the surrender of its jurisdiction, organization, and Confession of Faith. With such views alone, committees to confer with other denominations on the subject of union were appointed prior to 1903. But it has never been willing and is not now willing, to merge itself or to be merged into any other denomination. Besides to protect itself against any assumed or claimed authority of the General Assembly and church courts, to accomplish its destruction by a surrender of its organization and jurisdiction and a merger of it into some other body, it amended its constitution in 1883, by which such a plan was rendered impossible.

The Earle resolution adopted by the General Assembly, in 1898, did not affirm the power of the General Assembly to form any union, except in accordance with the provisions of the written constitution of the church. The resolution contemplated simply that any action with reference to union should have its origin in the General Assembly, and that synods and presbyteries could take no original action on such subject, under the laws of the church, which was in accordance with the written constitution.

Besides, a mere contemporaneous and practical construction is never allowed to supercede and destroy a plain and positive constitutional provision, such as we have here.

Mr. Cooley, in his work on constitutional limitation, says:

> "Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow extrinsic circumstances to introduce a difficulty, where the language is plain. To allow force to a practical construction in such a case would be no suffer manifest perversions to defeat the evident purpose of the law makers." (Cons. Lim., pp. 83-84.)

Quoting from Mr. Story, th same author continues:

> "Contemporary construction * * * can

never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitation; it can never enlarge its natural boundaries." Cons. Lim., p. 84, citing Story on Constitution, Sec. 407.)

XIV.

If there was no other infirmity in the scheme, the same would nevertheless be void, for the reason, that the doctrines and polity of the two churches are not the same and the one can not be merged into the other, without violating the trust upon which the same was acquired and held under the law of the land.

(a) *Differences in doctrine.*

There must be identity of doctrine and faith before a majority of a church organization can take the church property into another church.

Boyles v. *Roberts*, 222 Mo., l. c., 655, 666;
Landrith v. *Hudgins*, 121 Tennesssee, 626-629;
Free Church of Scotland Cases, Law Reports Appeal Cases, 1904, 669.

Thus in the case of *Boyles* v. *Roberts*, 222 Mo., l. c., 656, the court says:

"That there must be identity of doctrine and faith before a majority of a church organization can take the church property into another church is fully recognized by *McBride* v. *Por-*

ter, 17 Iowa, p. 203. That in case of a division in a church organization, that portion of the organization, whether the majority or the minority, which adheres to the existing creed, doctrines and faith at the time of the dispute, is entitled to the church property, is unquestioned law."

This same proposition is abundantly sustained by other authorities, as *Rodgers* v. *Burnett*, 108 Tennessee, 1835;

Roschi's Appeal, 69 Pa., 462;
Harper v. *Strauss*, 14 B. Monroe, 48;
Gartin v. *Penick*, 5 Bush, 110;
McGinnis v. *Watson*, 41 Pa., 13;
Schnorr's Appeal 67 Pa., 138;
Smith v. *Pedigo*, 145 Ind., 361;
and many other cases that might be cited.

But, contend respondents, the scheme and alleged contract cannot now be assailed upon such ground, by appellants for the reason, that such an attack is precluded by the finding of the General Assembly.

(b) *There was no finding by the General Assembly that the doctrines and polity of the two churches are the same.*

In the first place there has never been any finding by the General Assembly, that there was an identity of Confessions of Faith, doctrine, discipline or church polity. The most that is said

is, "it is mutually recognized that such agreement now exists between the systems of doctrine contained in the Confession of Faith in the two churches as to warrant the union—a union honoring alike to both."

Boyles v. *Roberts*, 222 Mo., l. c., 656; *Landrith* v. *Hudgins*, 121 Tenn., 626.

As said by the court in *Boyles* v. *Roberts*, 222 Mo., 656:

"If this be the ecclesiastical judgment, and it is the only one in the record upon the question, then there has never been an adjudication of the fact that there was *identity* in the two Confessions of Faith. There might be such a similarity of the confessions as to warrant united action between the churches, *and yet such an identity as is required to pass trust property.* The question as to whether or not these two Confessions of Faith are the same has never been adjudicated."

To the same effect is *Landrith* v. *Hudgins*, 121 Tenn., 626.

It might be added also that the matter above referred to does not exist in the record as a judgment, but simply appears as a part of the language of a committee report, found at p. 69 of the record, which committee report was adopted by the Assembly.

In the Free Church of Scotland Cases, the declaration of the assembly was that "*a remarkable and happy agreement obtained between*" the doctrines of the two churches, "*and that an incorporating union might be harmoniously accomplished.*"

In commenting on that statement Lord Robertson, one of the judges said:

> "There is no profession of *identity*, but of an '*agreement*' having been '*obtained*' which is described as '*remarkable.*' Now the steps and stages of the long negotiations are before the house, and from those it appears that on this question of establishment there were in 1863 and 1867 sharp differences. The tenets of the two bodies are printed in paralled columns and I am going shortly to refer to them."
> L. R., Appeal Cases, 1904, p. 669.

In that case the House of Lords rejected the declaration, as not being one which asserted that the two confessions were identical, and as being insufficient upon which to base the transfer of trust properties.

In the case at bar the parties themselves recognized that the language used was not sufficient upon which to base the union with its consequent transfer of trust properties. The language of the two committees in their reports to their respective assemblies, shows not only that they did not consider the doctrine, identical, but

that in their opinion, they were not identical, and that by the declaration they did not intend to say that they were identical. Laboring under the knowledge of the fact the law required identity of doctrines in the two churches in order to validate the scheme, in any event, they could not say so; the best they could say was, "that such agreement now exists" * * * "as to warrant this union." (Record 69.) This language was not satisfactory to either committee, and an effort was made to secure a different phaseology, but without success. (Rec., p. 279.)

> "Identity of faiths, doctrines and standards, described merely as 'sufficient agreement to warrant this union' is not that identity which the law demands when determining the rights of parties to trust property."

Boyles v. *Roberts*, 222 Mo., 666.

Again: The General Assembly of the Cumberland Church, even if it had declared the doctrines of the two churches identical, could not have bound the members of the Cumberland Church by such a declaration, (even if the conclusive effort of church judgments were conceded.) The most that the General Assembly could do and bind its own members would be to declare what the doctrines and faith of the Cumberland Church are, as an organization. It might declare the doctrines and faith of its own church, and its members be found by such construction,

but it would not follow therefrom that they had the right to declare what the doctrines and faith of the Presbyterian Church were, and thereby bind anybody. Yet that is exactly what is involved in the process of declaring the doctrines of the two churches to be identical. The doctrines and creeds of both churches must be construed in order to find that they are identical, or even to find "a sufficient agreement." The Cumberland Assembly may have had authority to find what the doctrines of that church were; but it had no authority to find and declare what the doctrines of the Presbyterian Church were, and in so doing bind the membership of the Cumberland Church. It, the General Assembly of the Cumberland Church, (if within the proper exercise of the amendatory power) might have amended its Confession of Faith and constitution by the adoption of the same Confession of Faith and constitution as held by the Presbyterian Church, and might have declared that there had been no change made in the doctrine of the Cumberland Church by reason of the amendment thereto, and in so doing, might have bound its own membership by such declaration. But such was never done, and if the same had been done, it would not have authorized the destruction and merger of the church. Whatever might be claimed as to the power of the General Assembly, within its own organization, it can not be claimed that it has authority except within its own organization. Neither would the Presbyterian Church have any authority to find and declare what the doctrines and laws of the

Cumberland Church are. They might declare what their own are, but certainly that would be the limit of their authority, and in so doing they would not thereby bind any members of the Cumberland Church.

Boyles v. *Roberts*, 222 Mo., l. c., 695.

Therefore if it should be the law that the decree of the church judicatory should be the decree of the civil court, there is no decree upon the vital question to be adjudicated by this court.

Boyles v. *Roberts*, 222 Mo., l. c., 657.

To the same effect with *Boyles* v. *Roberts*, is the case of *Landrith* v. *Hudgins*, by the supreme court of the State of Tennessee, wherein the same proceedings and alleged contract of union were in question, reported in the 121 Tenn., at pages 626-629 thereof, and wherein it is said by the court:

> "It is perceived that the two assemblies do not declare that the two Confessions of Faith, since the revision of one of them, are equivalent in doctrine on the disputed points, or are in substantial accord, but only such an agreement exists between them as to warrant a union, or as it is otherwise phrased by them, 'a sufficient agreement' to warrant the union. This carefully prepared form of statement, and the absence of a satement of full and substantial accord, indicates a consciousness of

an existing substantial difference which was to be bridged by the 'liberty of belief.' This same consciousness is indicated by the introduction to the concurrent declaration, and also by the fact that there was any concurrent declaration at all upon the subject. If the union was to become effective on the basis of the Confession of Faith and other standards of the Presbyterian Church,—no more was needed to be said. These standards spoke for themselves.

"We should here note with more particularity the significence of the expression 'such agreement * * * as to warrant the union,' and 'a sufficient agreement * * * to warrant the union,' appearing in the Moffatt resolution.

(The Moffatt resolution, referred to in the above, is found at pp. 135-6 of the record.)

"* * * When the General Assembly declares, not that such and such is the true doctrine of the church, but that there is simply 'a sufficient agreement,' between its system, and that of another organization, to warrant a union between the two, it is not engaged in making a statement of doctrine, but merely that a certain negotiation is feasible. It is only expressing its opinion as to the properity of a union."

The court in that case then proceeded to investigate and determine for itself whether or not the doctrines of the two churches were the same, or so nearly identical as to permit the

merger of the churches one into the other, without violating the trust upon which the properties were held, and reached the conclusion that they were not.

(c) *Examination of doctrines and creeds as well as of the laws of the two churches reveal material differences in many respects.*

The Presbyterian Church is Calvinistic in its doctrine, having for its creed the Westminister Confession of Faith; while the Cumberland Presbyterian Church, in its doctrines, has the middle creed between the Calvinism and Arminianism.

"The Confession of Faith of the Presbyterian Church was formed by what is known in history as the Westminister Assembly. * * * This notable assembly held its first meeting July 1, 1643, and continued to sit until February 22, 1649, * * * six years. The doctrine agreed upon in that assembly constituted the Confession of Faith in the Presbyterian Church. It may not be improper in this constitution to state that the theological views of John Calvin were the doctrines which were incorporated in that book. * * * As a scholar and debater, he had few equals in his day. Being a man of strong and determined will, he was accussed of being tyrannical in his religious views and statements; his theological views were, in the main, adopted by the West-

minister Assembly; those who adhere to that system are called Calvinists."

Blake's Old Log House, 75.

In the beginning of its existence and to 1883, the Cumberland Presbyterian Church used the Westminister Confession of Faith, with certain important written modifications and unwritten reservations. Its revision of the book in 1814 and again in 1829 was of that character. The object of those modifications and reservations was to exclude certain doctrines of the Westminister Confession of Faith, from which they dissented, and which are yet a part of the Westminster Confession of Faith as held by the Presbyterian Church.

In the year of 1813, before the first of its revisions was made, the Cumberland Presbyterian Synod, which was then the high judicatory of the church, formulated and published a 'brief statement,' setting forth certain leading views entertained by the Cumberland Presbyterians, in opposition to certain doctrines of the Westminister Confession of Faith. Such views are as follows:

1st., That there are no eternal reprobates.

2nd., That Christ died not for a part only, but for all mankind.

3rd., That all infants dying in infancy are saved through Christ and the sanctification of the spirit.

4th., That the spirit of God operates on the world, or as —co-extensively as Christ has made atonement, in such manner as to leave all men inexcusable.

In the revision, 1814-1829.

"All the boldly defined statements of the doctrine objected to were rejected, and corrected statements were made, but it was impossible to eliminate all the views of hyper-Calvinism from the Westminister Confession of Faith, by simply expunging the phraseology, and then attempting to fill the vacancies thus made by corrected statements, or other declaration, for the objectionable doctrine, with its logical sequences, pervaded the whole system of theology in that book."

Preface Confession of Faith and Government, 1 and 2, Rec., 253-255.

Because of that impossibility, and with a view of stating "more clearly and logically the theology taught and believed by the Cumberland Presbyterian Church, its whole Confession of Faith was rewritten and its doctrine restated in 1881-1882 in the form adopted in 1883.

Rec., 253-255.

The differences which led to the formation of the Cumberland Church still exist. The following parallel quotations show some of the essential doctrinal differences in the two churches.

PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA.
CONFESSION OF FAITH CHAPTER III.
OF GOD'S ETERNAL DECREE.

III. By the decree of God, for the manifestation of His glory, *some men and angels are predestined unto everlasting life, and others forordained to everlasting death.*

IV. These angels and men, *thus predestined and foreordained, are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished.*

V. Those of mankind that are predestined unto life, God, before the foundation of the world was laid, according to His *eternal and immutable purpose,* and the secret counsel and good pleasure of His will, hath chosen in Christ, *unto everlasting glory,* out of His mere free grace and love, without any foresight of faith or good works, or perseverance in either of them, or any other thing in the creature, as conditions or causes moving Him thereunto; and all to the praise of His glorious grace.

VI. As God hath appointed the elect unto glory, so hath He, by the eternal and most free purpose of His will foreordained all the means thereunto. Wherefore they who are *elected,* being fallen in Adam, are redeemed by Christ,

The differences which led to the formation of the Cumberland Church still exist. The following parallel quotations show some of the essential doctrinal differences in the two churches.

CUMBERLAND PRESBYTERIAN CHURCH.

CONFESSION OF FAITH DECREES OF GOD.

8. God, for the manifestation of His glory and goodness, by the most wise and holy counsel of His own will, freely and unchangeably ordained or determined what He himself would do, what He would require His intelligent creatures to do, *and what should be the awards respectively of the obedient and the disobedient.*

9. Though all Divine decrees may not be revealed to men, yet it is certain that God has decreed nothing contrary to His revealed will or written Word.

FREE WILL.

34. God, in creating man in His own likeness, endued him with intelligence, sensibility and will, which form the basis of moral character, and render man capable of moral government.

35. *The freedom of the will* is a fact of human consciousness, and is *the sole ground of human accountability.* Man in his estate of innocence, was both free and able to keep the Divine law, also to *violate* it. Without any constraint, from either physical or moral causes, he did violate it.

CATECHISM.

Q. 7. What are the decrees of God?

The decrees of God are His wise and holy pur-

are *effectually called* unto faith in Christ by His spirit working in due season; are justified, adopted, sanctified and kept by His power through faith unto salvation. Neither *are any other* redeemed by Christ, *effectually called*, adopted, justified, sanctified and saved, *but the elect only.*

VII. The rest of mankind, God was pleased according to the unsearchable counsel of His own will, whereby He extendeth or withholdeth mercy as He pleaseth, for the glory of His sovereign power over His creatures, to pass by, and to ordain them to dishonor and wrath for their sin, to the praise of His glorious justice.

THE LARGER CATECHISM.

Q. 12. What are the decrees of God?

A. God's decrees are the wise, free and holy acts of the counsel of His will, whereby, *from all eternity* He hath, for His own glory, *unchangeably foreordained whatsoever comes to pass in time,* especially concerning the angels and men.

Q. 13. What hath God especially decreed concerning the angels and men?

A. God, by an eternal and immutable decree, out of His mere love, for the praise of His glorious grace, to be manifested in due time, hath *elected some angels to glory;* and in Christ hath

poses to do what shall be for His glory. Sin not being for His glory, therefore He has not decreed it.

DIVINE INFLUENCE.

38. God, the Father, having set forth His Son, Jesus Christ, as a propitiation for the sins of the world, does most graciously vouchsafe a manifestation of the *Holy Spirit with the same intent to every man.*

REGENERATION.

51. *Those who believe* in the Lord Jesus Christ *are regenerated,* or born from above, renewed in spirit, and made new creatures in Christ.

54. *All infants* dying in infancy, and all persons who have never had the faculty of reason, are regenerated and saved.

CATECHISM.

21. What are the evils of that estate into which mankind fell?

Mankind, in consequence of the fall, has no communion with God, discerns not spiritual things, prefers sin to holiness, suffers from the fear of death and remorse of conscience, and from the apprehension of future punishment.

22. Did God leave mankind to perish in this estate?

No; God, out of His mere good pleasure and love, *did provide salvation for all mankind.*

chosen some men to eternal life, and the means thereof; and also according to His sovereign power, and the unsearchable counsel of His own will (whereby he extendeth or withholdeth favor as He pleaseth), hath *passed by and foreordanied the rest to dishonor and wrath*, to be for their sin inflicted, to the PRAISE of the glory of His justice.

THE SHORTER CATECHISM.

Q. 7. What are the decrees of God?

A. The decrees of God are His eternal purpose according to the counsel of His will, whereby, for His own glory, *He hath foreordained whatsoever comes to pass.*

CHAPTER X.

OF EFFECTUAL CALLING.

I. *All* those whom God hath *predestined unto life* and, *those only*, He is pleased in His appointed an accepted time, *effectually to call* by His word and Spirit, out of that state of sin and death, in which they are by nature, *to grace and salvation* by Jesus Christ; enlightening their minds spiritually and savingly, to understand the things of God; taking away their heart of stone, and giving unto them a heart of flesh; renewing their wills, and by His almighty power determining them to that which is good; and *ef-*

CUMBERLAND PRESBYTERIAN CHURCH.

CONFESSION OF FAITH DECREES OF GOD.

23. How did God provide salvation for mankind?

By giving His Son, who became man, and so was and continues to be, both God and man in one person, to be a propitiation *for the sins of the world.*

JUSTIFICATION.

48. *All those who truly repent of* their sins, and in faith commit themselves to Christ, God freely justifies. * * *

SAVING FAITH.

45. Saving faith, including assent to the truth of God's Holy Word, is the *act of receiving and resting upon Christ alone for salvation,* and is accompained by contrition for sin and a full purpose of heart to turn from it and to live unto God.

PERSERVATION AND BELIEVERS.

60. Those whom God hath *justified,* He will also glorify, consequently the truly regenerated souls will not totally fall away from a state of grace, but will be preserved to everlasting life.

61. The preservation of believers depends on the unchangeable love and power of God, the merits, advocacy, and intercession of Jesus

fectually drawing them to Jesus Christ, yet so as they come most freely, being made willing by His grace.

II. This *effectually call* is of God's free and special grace alone, not from anything at all foreseen in man, who is altogether passive therein, until being quickened and renewed by the Holy Spirit, he is thereby enabled to answer this call, and to embrace the grace offered and conveyed in it.

III. *Elect infants,* dying in infancy are regenerated and saved by Christ through the Spirit, who worketh when, and where, and how He pleaseth. So also are all elect persons, who are incapable of being outwardly called by the ministry of the Word.

IV. *Others not elected, although they may be called by the ministry of the Word, and may have some common operations of the Spirit,* yet they *never truly come* to Christ, and therefore *cannot be saved;* * * *

THE LARGER CATECHISM.

Q. 67. What is effectual calling?

A. *Effectual calling* is the work of God's almighty and grace, whereby, (out of His free and especial love to His *elect,* and from nothing in them moving Him thereunto) He doth in His accepted time invite and draw them to Jesus

CUMBERLAND PRESBYTERIAN CHURCH.

CONFESSION OF FAITH DECREES OF GOD.

Christ, the abiding of the Holy Spirit and seed of God within them, and the nature of the covenant of grace. * * *

(Rec., pp. 315, 318.)

Christ, by His Word and Spirit, savingly enlightening their minds, renewing and powerfully determining their wills, so as they (although in themselves dead in sin) are hereby made willing and able, freely to answer His call, and to accept and embrace the grace offered and conveyed therein.

Q. 68. Are the elect only effectually called?

A. *All the elect, and they only, are effectually called;* although others may be and often are *outwardly called* by the ministry of the Word, and have some *common operation* of the Spirit; who for their wilful neglect and contempt of the grace offered to them, being justly left in their unbelief, do never truly come to Jesus Christ.

THE SHORTER CATECHISM.

Q. 19. What is the misery of that estate whereunto man fell?

A. All mankind, by their fall, lost communion with God, are under His wrath and curse, and so made liable to all the miseries of this life, to death itself, and to the pains of hell forever.

Q. 20. Did God leave all mankind to perish in the estate of sin and misery?

A. God, having out of His mere good pleasure, *from all eternity elected some* to everlasting life, did enter into a covenant of grace, to deliver them out of the estate of sin and misery, and to

bring them into an estate of salvation by a Redeemer.

Q. 21. Who is the Redeemer of God's elect?

A. The only Redeemer of God's elect, is the Lord Jesus Christ, who, being the eternal Son of God, became man and so was continued to be God and man, two distinct natures and one person forever.

CHAPTER XI.

OF JUSTIFICATION.

I. Those whom God *effectually calleth,* He also *justifieth;* * * *

IV. God did, *from all eternity,* decree to justify *all the elect;* and Christ did in the fullness of time die for their sins, and rise again for their justification; nevertheless they are not justified, until the Holy Spirit doth, in due time actually apply Christ unto them.

CHAPTER XIII.

OF SANCTIFICATION.

1. They who are *effectually called* and regenerated, having a new heart and a new spirit created in them, are further sanctified, really and personally, through the virtue of Christ's death and resurrection, by His Word and Spirit dwelling in them: * * *

PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA.
CONFESSION OF FAITH CHAPTER III.
OF GOD'S ETERNAL DECREE.

THE LARGER CATECHISM.

Q. 75. What is sanctification?

A. Sanctification is a work of God's grace, whereby they whom God hath *before foundation of the world chosen to be holy*, ARE IN TIME, THROUGH THE POWERFUL operation of His Spirit, applying the death and resurrection of Christ unto them, renewed in their whole man after the image of God; * * *

CHAPTER XIV.

OF SAVING FAITH.

1. The grace of faith, whereby *the elect are enabled to believe* to the saving of their souls, is the work of the Spirit of Christ in their hearts; and is ordainarily wrought by the ministry of the Word; by which also and by the administration of the Sacraments, and prayer, it is increased and strengthened.

CHAPTER XVII.

OF THE PERSEVERANCE OF THE SAINTS.

I. They whom God has accepted in His beloved, *effectually called* and sanctified by the Spirit, can neither totally nor finally fall away from

the state of grace, but shall certainly persevere therein to the end, and be eternally saved.

II. This perseverance of the saints depends, not upon their own free will, but upon the *immutability of the decree of election,* flowing from the free and unchangeable love of God the Father; upon the efficacy of the merit and intercession of Jesus Christ; the abiding of the Spirit and of the seed of God within them; and the nature of the covenant of grace; from all which ariseth also the certainty and infallibility thereof.

(Rec., pp. 324-327.)

(These differences will appear from an examination of the parallel columns in the record pp. 431-2, 435-6.)

REVISION OF 1903.

In the year 1903, the Presbyterian Church made a "declaratory statement" concerning said Chapter 3, Section 3 of Chapter 10 of its Confession of Faith, and added two new chapters to the book, thereby constituting what is called the "Revision of 1903." (Record, 236.)

It is not believed, however, that the said state-

ment made any change in the original meaning of the Confession of Faith, or that such statement and the added chapters rendered the book any less Calvinistic than it was in 1810, when the Cumberland Church was organized. The statement does not propose to be anything more than explanatory, which could have been made in 1810 as well as in 1903. The language of the original book remains unchanged and unaltered. A few facts originally are referred to in the statement. Neither the larger catechism nor the shorter catechism, both of which are in vital antagonism to the written Confession of Faith of Cumberland Presbyterians, are referred to, or in any manner changed or altered by the statement of the added chapters. The original text of the Westminister Confession of Faith as it existed in 1789 and 1810, has been reproduced literally in the book of 1906, and the meaning thereof is in no degree affected by the declaratory statement, or the added chapters.

In 1901 the General Assembly of the Presbyterian Church instructed its committees on reviews to propose amendments to certain portions of its Confession of Faith.

"Either by modification of the text or by declaratory statement, but so far as possibly by declaratory statement, so as more clearly to express the mind of the church; with additional statements concerning the love of God for all men, missions and the Holy Spirit. It being understood that the revision shall in no

way impair the integrity of the system of doctrine set forth in our Confession, and taught in the Holy Scriptures." (Rec., p. 315.)

In 1904, after the question of union and merger now under consideration was raised, the General Assembly of that church, by resolutions passed, declared as follows:

"Resolved, that the Assembly, in connection with this whole question of union with the Cumberland Presbyterian Church, places on record its judgment that the revision of the Confession of Faith effected in 1903, has not impaired the integrity of the system of doctrine contained in the Confession of Faith and taught in the Holy Scriptures, but was designed to remove misapprehensions as to the proper interpretation thereof. (Rec., 279.)

Should it satisfy the Cumberland Presbyterians to tell them that the founders of their church labored under "a misapprehension as to the proper interpretation" of those parts of the Westminister Confession of Faith leading to the separation in 1810, or some of them, and that a proper interpretation of that book, without a change of a word in the text, it is now found to mean what neither of the two churches understood it to mean prior to 1903, and that by this later interpretation the creeds of the two churches are made identical, and that the Westminster Confession, through unchanged in this

text, has the same meaning as the Cumberland Presbyterian Confession, adopted in opposition to it in the year of 1883? No doubt existed about the true interpretation of the Westminster Confession in the year of 1810. The Presbyterian Church, and those who founded the Church, and those who founded the Cumberland Church, gave it the same interpretation at that time. The founders of the Cumberland Church did not voluntarily withdraw from the Presbyterian simply because of their interpretation of that book, but were excluded from that church, because of their refusal to accept its teachings as then understood by that church and by them. The same differences exist now as did in 1810.

There are many other material differences between the respective doctrines of these two churches besides those heretofore indicated by quotations given. These other differences are readily found in the printed Confession of Faith. The one Confession is now as full of Calvinism as it ever was, and the other is as far from hyper-Calvinism as it ever was.

No one denies more stoutly than the Presbyterian Church, that it has eliminated from its system a single doctrine of the Westminster Confession.

In May, 1907, the General Assembly of the Cumberland Church addressed a communication to the General Assembly of the Presbyter-

ian Church, in which is found the following paragraph:

"A large per cent of those leaving our communion for yours have been mislead into that course by the often repeated statement, in public addresses and otherwise, to the effect that your church has abandoned the Westminster Confession of Faith as originally written and come to the doctrines of our church. In the pastoral letter sent out by former Cumberland Presbyterians as early as June, 1906, is found this statement: 'but what is still more important to us, in that the Presbyterian General Assembly has declared that its amended creed is substantially the same as our own.' And again, 'the Presbyterian General Assembly by adopting the printed reports, has also, in substance, declared that our Confession of Faith, clearly expresses the meaning of its own Confessions of Faith, which we have adopted.' It is not believed that a majority of your church has sanctioned these misleading and unjustifiable statements, or that your church desires to occupy the attitude indicated before the world." (Rec., p. 289.)

The reply was:

"We had not heard, until your communication announced it, that anybody had claimed, or induced others to believe, that the Presbyterian Church in the United States of America, had abandoned the Westminster Confes-

sion of Faith. This is not true." (Rec., p. 292.)

(d) *Calvinism a complete and compact system.*

"Calvinism is a complete and compact system, and, as in a well constructed arch, each separate doctrine is a keystone, which cannot be altered without endangering the whole. As from a foot, we may infer the proportions of a statute, or reproduce a saurian form from its fossil fragments, so each single doctrine of the Calvinistic scheme, naturally and necessarily involves the adoption of all the rest. Forgetful or unconscious of that truth they (the Cumberland Presbyterians) endeavored, in the altered edition of the Confession and catechism, to steer a middle course between Calvinism and Arminianism, thereby rejecting the doctrine of eternal reprobation, spiritual grace, and maintaining that the Spirit of God operates on the world, or co-extensively with the atonement so as to leave all men inexcusable."

Blake's Old Log House, p. 76, Record, p. 300.

(e) *Medium system of theology stated.*

"The Cumberland Presbyterian Church claims to occupy what it denominates the 'MEDIUM SYSTEM OF THEOLOGY'—a middle ground between Calvinism and Armin-

ianism. The two latter systems (Calvinism and Arminianism) as we all know, are regarded as the *extremes* of theology. It is claimed by the advocates of the systems that there is no medium ground; that every one must either be a Calvinist or an Arminian in his religious belief or else he is nothing; but such an assertion, when analyzed, is absured —might as well say there is no territory between the north and south poles, or that there is no space between the extreme ends of a platform! How could these two systems be the *extremes* of theology without having this intermediate area—this medium ground?

"But let us examine those systems (Calvinism and Arminianism), and see if there is not a theological medium ground.

"1. The Doctrine of Election—*Calvinism* teaches that election is unconditional. *Arminianism* teaches that there is no election in this life. *Medium system* teaches that there is an election, but that it is conditional.

"2. The Doctrine of Salvation.—*Calvinism* teaches that salvation is unconditional to sinners, but certain to Christians. *Arminianism* teaches that salvation is conditional to sinners, but uncertain to Christians. *Medium system* teaches that salvation is conditional to sinners, but certain to Christians.

"3. The Date of Election.—*Calvinism* teaches that the date of election is before man was created. *Arminianism* teaches that the date of election is not prior to the death of the Christian, if indeed, it occurs then. *Medium*

system teaches that the date of election is the moment when the sinner is regenerated.

"4. The Extent of the Atonement.—*Calvinism* teaches that Christ died for only a part of the human race—that salvation is not possible to all, and that none but those who were 'elected from the foundation of the world,' will be saved. *Arminianism* teaches that the atonement of Christ was made for all mankind—that salvation is possible to all; but, as Christians may fall from grace, it is not certain that anyone will be saved. *Medium system* teaches that the atonement was made for all mankind—that salvation is possible to all, and that everyone who has been truly regenerated will be saved.

"5. The Perseverance of the Saints.—*Calvinism* teaches that perseverance depends principally upon the immutability of the decree of unconditional election. *Arminianism* teaches that perseverance depends principally upon the good works of the creatures. *Medium system* teaches that perseverance depends, not upon the immutability of the decree of unconditional election, nor upon the good works of the creature, but upon the love of God, the merits of Christ, the abiding of the Spirit and the covenant of grace."

The Old Log House, pp. 267-270.

"Passing the catalogue of doctrines, in which all orthodox Christians substantially agree—such as the existence of God, the Trin-

ity, the authenticity of the Bible, creation, providence, the fall of man, etc., etc.,—the Cumberland Presbyterian Church holds to the following doctrines: That Christ died for the whole human race; that the atonement is sufficiently broad to embrace in its provisions every son and daughter of Adam; that the Holy Spirit strives with all; that the sinner is saved by the imputed righteousness of Christ; that faith is the condition upon which salvation is bestowed; that every truly regenerated soul will be saved; that all infants dying in infancy are regenerated and saved by Christ, through the Spirit, so also are all others who have never had the exercise of reason, and who are incapable of being outwardly called by the ministry of the Word."

* * * The Old Log House, 272-3. Rec. 300.

The doctrines of the Presbyterian Church in the United States of America, those being set forth in the Westminster Confession of Faith, are different from those of the Cumberland Presbyterian Church as to all of the points just recited, as will readily appear from a comparison of the Confessions of Faith of the two churches, especially by a comparison of those parts of the two Confessions exhibited in parallel columns in another part of this brief and argument.

(f) *Ordo Salutis.*

The *ordo salutis*, or order of salvation and

growth in grace, as taught by one of these Churches and presented in its Confession of Faith, is largely the reverse of that taught and presented by the other one, each being in harmony with its own system. It has always been so. The conflict, though going to the very root of the difference in the two systems, was not changed by the revision.

The order is:

Presbyterian Church, U. S. A. Regeneration, (or Effectual Calling),

Justification,
Adoption,
Sanctification,
Faith,
Repentance,
Good Works,
Perseverance.

Cumberland Presbyterian Church. Divine Influence, (Conviction),

Repentance,
Faith,
Regeneration,
Adoption,
Sanctification,
Growth in Grace
Good Works.

The following resolution, adopted by the General Assembly of the Cumberland Presbyterian Church, in 1899, is self-explanatory, namely:

"Resolved, that this General Assembly affirms its unequivocal adherence to our Confession of Faith and catechism in the order of the doctrine of repentance, faith and regeneration, and that any arrangement, logical or otherwise, which places regeneration in order before repentance and faith displaces faith as the condition of salvation and is inconsistent with the system of doctrines of the Cumberland Presbyterian Church." (Record, p. 300.)

(g) *Brief Statement.*

The "Brief Statement," adopted by the General Assembly of the Presbyterian Church in the United States of America, in the year 1902, is no part of the Confession of Faith of that church. In the supplemental report of the committee of that church filed in connection with the joint report on union this language is used by that committee, namely:

"The brethren of the Cumberland Presbyterian Church understood clearly that the 'Brief Statement' was not a part of the constitution, but simply a doctrinal deliverance; that it had force as interpreting the Reformed Faith only so long as it should be acceptable to the church, and that it could be altered or rescinded by any General Assembly." (Rec. 279.)

The next year the General Assembly negatived

an overture from the Presbytery of Nassau, asking that the 'Brief Statement' be adopted and used as the creed of that church.

(h) *Doctrines never declared identical by the two churches.*

As stated, the General Assemblies of the two churches have never declared the respective doctrines of the two denominations to be identical.

The joint committee simply reported, on that subject, in very cautious language, that:

> "It is mutually recognized that *such agreement* now exists between the systems of doctrine contained in the Confession of Faith of the two churches *as to warrant this union*—a union alike honoring to both. * * * It is also recognized that *liberty of beliefs* exists by virtue of the provisions of the Declaratory Statement." (Record, p. 278.)

The General Assembly simply adopted *that language* as a part of the joint report, in which it appeared as a portion of the 1st section of the second grand division of that report called "Concurrent Declarations."

In 1906, the General Assembly of the Presbyterian Church, U. S. A., passed the Moffat resolution, in which it is said that by adopting the joint report:

"The two Assemblies in 1904 did declare that there was then *sufficient agreement* between the systems of doctrine contained in the Confessions of the two churches *to warrant the union.*" (Record, p. 136.)

So then the whole of the expression actually made on this subject is: (1), the statement in the joint report that there was *such agreement as to warrant the union* and that *liberty of belief* was allowed; (2), *the adoption* of that report, containing that statement, by the General Assemblies of the two churches, and, (3), the passage of a resolution by the Presbyterian Church, U. S. A., construing *the adoption* of the joint report as *a declaration* by the two Assemblies that there was in 1904 *sufficient agreement to warrant the union.*

The Supreme Court of Tennessee, after quoting and analyzing what had been done on this subject, said:

"It is perceived that the two Assemblies do not declare that the two Confessions of Faith, since the revision of one of them, are equivalent in doctrine on the disputed points, or are in substantial accord, but only '*such an agreement*' exists between them *as to warrant* a union, or, as it is otherwise phrased by them, a '*sufficient agreement*' to warrant the union. This carefully prepared form of statement, and the absence of a statement of full and substantial accord, indicates a consciousness of

an existing substantial difference which was to be bridged by the 'liberty of belief.' This same consciousness is indicated by the introduction to the concurrent declarations, and also by the fact that there was any concurrent declaration at all upon the subject. If the union was to become effective on the basis of the Confession of Faith and other standards of the Presbyterian Church in the United States of America, no more was needed to be said. These standards spoke for themselves.

"We should here note with more particularity the significance of the expressions 'such agreement' * * * 'as to warrant this union,' and 'a sufficient agreement * * * to warrant the union," appearing in the Moffat resolution.

"If there had been an explicit declaration on the part of the two Assemblies, that the two systems of doctrine were in full accord, or in substance the same, and if it had been a matter about which a fair difference of opinion might exist, we should feel bound to give such declaration very great weight on the ground that the persons composing such Assemblies are far more familiar with theological questions than the members of a civil court can be. But, when the General Assembly declares, not that such and such is the true doctrine of the church, but that there is, simply, 'a sufficient agreement' between its system and that of another organization, to warrant a union between the two, it is not engaged in making a statement of doctrine, but merely

that a certain negotiation is feasible. It is only expressing its opinion as to the propreity of a union."

Again:

"We are then compelled to determine for ourselves, whether the two systems of doctrine are substantially the same. We must determine this question in the affirmative, before we can be justified in holding that the property formerly belonging to the Cumebrland Presbyterian Church now belongs to the Presbyterian Church in the United States of America. This is true because the deed of property in question in the present case was made to trustees for the benefit of a Cumberland Presbyterian congregation, and cannot, without breach of the contract, be diverted to the maintenance of a different faith, unless the Cumberland Presbyterian faith has been changed into the new form, by competent ecclesiastical authority — a matter which we shall consider further on.

"We think it is quite apparent from the record of the proceedings for union that the Presbyterian Church in the United States of America adheres to every line of the Westminster Confession, and regards the declaratory statement not as an amendment or change of the Confession, but only an explanation of it, for the purpose of disavowing inferences drawn from certain statements in the Confession of Faith and to give legal standing to in-

terpretations of Chapter 3 and of Chapter 10, Section 3, which previously had seemed to have merely the force of private opinion, and also to set forth clearly some aspects of revealed truth which appeared to call for more explicit statement. The General Assembly of that church explicitly declared by resolution, that these things had been made clear to the committee of the Cumberland Presbyterian Church, and also 'that the revision of the Confession of Faith had effected no material change in the doctrinal attitude' of that church. Again, in another resolution during the same sitting, it declared that the revision of the Confession of Faith in 1903 has not impaired the integrity of the system of doctrine contained in the Confession and taught in Holy Scripture, but was designed to remove misapprehension as to the proper interpretation thereof.' Again in 1907, that church, in answer to a letter from the Assembly at Dickson, Tennessee, denied that it had abandoned the Westminster Confession of Faith."

Landrith v. *Hudgins*, 121 Tenn., 626-629.

The Supreme Court of Missouri, in *Boyles* v. *Roberts*, *supra*, after finding that there was no ecclesiastical finding in the record, adjudging that there was identity in the two Confessions of Faith, examined the question of identity of the two Confessions, for itself saying:

"Was there identity of church faith, discip-

line and polity? Was there identity of the Confessions of Faith? We say not, and for two reasons. First, from the evidence before us nobody claims that there was, and, secondly, an examination of the documents themselves fails to so indicate. We shall consider in this paragraph the testimony (by way of written statements) of the parties themselves that there was no identity of the Confessions of Faith.

"With the report of the committee on fraternity and union there came to the Cumberland Presbyterian Assembly a supplemental report, signed by William H. Black for the committee. I take it this was the action of the Cumberland Presbyterian half of the joint committee. This supplemental report urge many reasons for action in favor of union. This report concluded with this remarkable admission:

"Further, it is the opinion of your committee that the doctrinal status as between the two Confessions of Faith favors it. There never can be a unanimity that is absolute, where many finite intelligences are concerned. We see things from different points of view, with different degrees of emphasis, out of differing personalities and impelled by disparate motives; therefore it is to be expected that any one who is desirous can find objections in the statements of another; but brethren dwell together in unity, not by identity of beliefs, nor by the acceptance of absolutely unobjectionable doctrinal symbols, but by mutual toler-

ance, forbearance and love. If this union consummated, the real tie which binds will not be in the confessional symbol of the United Church, but the Spirit of Christ in the hearts of the brethren."

"Note the language, 'but brethren dwell together in unity, *not by identity of beliefs*, nor by the acceptance of absolutely unobjectionable doctrinal symbols, *but by mutual tolerance forbearance and love.*' (For this report, see record in case at bar, p. 66.)

"This comes from the committee which for twelve long days considered the subject, and all they can say is 'that the doctrinal status' favors union, but adds that such union will be 'not by identity of belief, * * * but by mutual tolerance, forbearance, and love.' Such identity is not sufficient to carry with it trust property.

"By the report itself it is suggested, as in paragraph two of this opinoin fully quoted, that 'it is mutually recognized that such an agreement now exists between the systems of doctrines contained in the Confesions of Faith. * * * as to warrant this union.' Not a word said about the identity of the system of doctrine in the respective Confessions of Faith. Further they say 'it is also recognized that liberty of belief exists by virtue of the declaratory statement,' etc. Why suggest that there was liberty of belief if identity of doctrine and faith was to be procured by this union? * * * Now let us take the Presbyterian side of the question and get their views of the

identity. When the General Assembly voted upon and adopted the plan of union reported by the joint committee it passed a resolution making it clear what effect that church thought the revision of 1903 had upon the Westminster Confession of Faith. Section 4 reads: 'That the Assembly, in connection with this whole subject of union with the Cumberland Presbyterian Church, places on record its judgment, that the revision of the Confession of Faith effected in 1903 has not impaired the integrity of the system of doctrine contained in the Confession and taught in the Holy Scripture, but was designed to remove misapprehensions as to the proper interpretation thereof.' If the revision of 1903 'has not impaired the integrity of the system of doctrine' in their Confession of Faith, which was the Westminster Confession of Faith, then by the declaration of the Presbyterian Assembly itself, the Westminster Confession of Faith stands unimpaired with all of its doctrine of fatality in full force. If it has not been *impaired* it remains *unimpaired—unchanged.* The representatives appointed by the Presbyterian Church on the joint committee made a report to their church, when they presented the joint report upon union. In this report, among other things, it was said that at the outset certain things were made plain to the Cumberland brethren of the committee, and among these things made plain, was this: 'And that the revision of the Confession of Faith had effected no material change in the

doctrinal attitude of our church.' That doctrinal attitude prior to 1903 was the Westminster Confession of Faith and this had not been materially changed. This committee further says: 'The language used in the first paragraph of Concurrent Declaration No. 1, declaring that "such agreement now exists between the systems of doctrine contained in the Confession of Faith of the two churches as to warrant this union—a union honoring alike to both," was primarily the language of that committee (meaning the Cumberland committee). It is to be interpreted in the light of the fact that preceding it the statement is found that the Cumberland Presbyterian Church is to adopt the Confession of Faith of the Presbyterian Church in the U. S. A. Whatever the differences between the churches have been, and there have been decided differences, these brethren must be regarded as giving expression to the sincere conviction that such a doctrinal agreement now exists between the churches as to warrant their adopting our confession as interpreted by the Declaratory Statement. Your committee likewise appreciated the power of this presentation made by the brethren of the other committee, and while the language of Declaration No. 1 was not satisfactory to them or to us, and effort was made to secure a different phraseology, it was felt by all that some cordial acknowledgment of a sufficient doctrinal agreement to warrant union should union be deemed advisible, was due to a church, which it is

proposed by both committees should yield its name, adopt our standards as an entirety, and find complete union with us.' (See Record in case at bar, pp. 275-279.)

"If there could be a clearer admission that the parties considering the question did not think there was substantial identity, we misinterpret the language of these distinguished theologians. Not only were they not satisfied that there was identity of faith and doctrine, but what they did agree upon was satisfactory to neither, but this committee felt there should be 'some cordial acknowledgment of a sufficient doctrinal agreement to warrant union.'

"No concession here that there were two churches with the same faith, but that there would be if the Cumberland Presbyterians would 'adopt our standards as an entirety, and find complete union with us.'

* * *

"In 1907 the General Assembly of the Cumberland Presbyterian Church sent a communication to the General Assembly of the Presbyterian Church, U. S. A., to which reply was made. In this reply we find this language:

"We had not heard, until your communication announced it, that anybody had claimed or induced others to believe that the Presbyterian Church in the U. S. A., had abandoned the Westminster Confession of Faith. This is not true.' * * *

"This record evidence, which speaks louder than words, shows that the Presbyterian Church, U. S. A., is holding on with tenacity

to the system of doctrine promulgated at Westminster. After the union that church, through its General Assembly, boldly announces that if anybody claimed or induced others to believe that it had abandoned the Westminster Confession of Faith such was not true. Note the language above. 'This is not true,' * * *

"We conclude this paragraph by saying that the evidence of the parties themselves does not show that they considered there was identity of doctrines such as the law demands."

222 Mo., 657-8, 661-6.

The court then sets forth certain parts of the Confession of Faith and catechisms of the two churches for comparison, and reaches the conclusion that, "They are diametrically opposed to each other." (Ib. 671.)

In the Free Church of Scotland case, there was a joint declaration asserting that "a remarkable and happy agreement" obtained between the doctrines of the two churches, and that an incorporating union might harmoniously be accomplished.

In commenting on that statement, Lord Robertson said:

"There is no profession of identity, but of an 'agreement' having been 'obtained' which is described as 'remarkable.' Now the steps

and stages of these long negotiations are before the house, and from these it appears that on this question of establishment there were, in 1863 and 1867, sharp differences. The tenets of the two bodies are printed in parallel columns, and I am going to shortly refer to them."

Appeal Cases, 1904, p. 669.

The House of Lords in that case examined and compared the doctrines of the two churches for themselves, and finding them different, held the attempted union illegal and ineffective so far as rights of property were concerned.

(i) *Polity different.*

.. The polity of the Cumberland Presbyterian Church is also different from that of the Presbyterian Church in the United States of America in several essential particulars, especially in reference to the commingling of the white and black races in the presbyteries and synods and general assemblies.

Negroes are not admitted as members in any of those judicatories of the Cumberland Presbyterian Church; but they are admitted in all of them by the Presbyterian Church in the United States of America—in its General Assembly upon exact equality with white members, and in its presbyteries and synods with certain doubtful provisions for separation of the two races at

the discretion of the General Assembly and upon its order. Those provisions in reference to the separation of the races in the presbyteries and synods were brought about by the recommendation in the joint report on union and re-union, as appears from the minutes of the General Assembly of the latter church in the year 1904.

In the report made to that body in connection with the joint report, its committee said:

> "No effort was made by the Cumberland Presbyterian committee to secure any change as to the church relations of the colored ministers and congregations in connection with its General Assembly. It was understood that these relations were matters that belonged to our church alone. * * *
>
> "The committee in all its negotiations stood firm upon the scriptural principles of the real unity of the household of faith and the equality of all its members. It was so clearly understood by both committees that these principles were to control the church in the future as well as in the past, and that as a result, if presbyteries were organized on race or national lines they would be represented equally with all other presbyteries in the Genral Assembly. This equal representation of all presbyteries in the supreme court will emphasize and preserve the unity of the church, while allowing, so long as needful, in exceptional cases, separate congregations, presbyteries and synods." (Rec., p. 278.)

The change actually made in Section 2 of Chapter 10 of the Constitution of the Presbyterian Church was made by the insertion of the words,

> "But in exceptional cases a presbytery may be organized within the boundaries of existing presbyteries, in the interest of ministers and churches speaking other than the English language *or of those of a particular race*, but in no case without their consent, and the same rule shall apply to synods." (Rec., 305.)

In reference to this change, before it was made, the General Assembly was careful to explain its position by the passage of the following resolution, being one of a series upon the subject of the so-called union, namely:

> "Resolved, 5. That in approving the overture looking to a change in the form of government concerning the territorial bounds of presbyteries and synods, this assembly affirms its complete freedom from prejudice against any race and from any desire or purpose to bring about a separation from our church, or from representation in the General Assembly, of any class or race of Presbyterians but on the other hand, our purpose is to bring together in one church members of all races and all classes." (Rec., p. 650.)

But the *climax* of the embarrassment and danger lies in the *stern and irrevocable* fact

that white men and negroes must *forever* meet together on terms of *absolute equality* in the *General Assembly*, the *highest judicatory* of the great Presbyterian Church in the United States of America.

If the two races must remain *inexorably bound together in the General Assembly*, why not leave them together in the presbyteries and *synods* also? *Or if association upon exact terms of equality and rivalry* is to be *enforced* during *one* of *three weeks*, why not during the *other two* likewise? Or if *part of the time*, why not *always?*.

Harmful and disastrous to both races and to the general cause of religion, must be the tendency and ultimate result of such commingling of white men and negroes, on terms of *exact equality* and with an *equal privilege* and *right of rivalry for the moderatorship*, stated clerkship, chairmanships of the boards of the church, presidency of its colleges, etc. etc.

Shall unwilling white churchmen be forced into an alliance which compels such association with negroes; or *refusing to enter, shall they pay the penalty of refusal by a forfeiture of their houses of worship and other property to another denomination which believes in, proclaims and protects such association among its own members?*

The difficulties in the solution of what is

popularly called the *race question or problem* are only enhanced, as we believe, by every encouragement of social equality between negroes and white men.

For years there has been a separate and independent Christian organization of negroes, calling itself and being know as the "Cumberland Presbyterian Church, colored." It has done a good work for the Lord. In 1905, the stated clerk of its General Assembly sent a telegram to the stated clerk of the Presbyterian Church in the U. S. A., stating that the "General Assembly of the Cumberland Presbyterian Church, Colored, appointed a committee of seven to confer with a like committee of your General Assembly, looking to union." This telegram was acknowledged by the latter assembly, and by it referred to the committee on co-operation and union already charged with such relation.

In the "Year Book" of the Southern Presbyterian Church, "published by order of the assembly of 1906," are stated several important truths and principles, to which that church bears distinct and emphatic testimony. One of them being:

> "VI. It (that church) has committed itself to the policy of a separate church for the colored people. It has been moved thereto, (a) by deference to the wishes of the colored people; (b) by the conviction that the increased responsibility would best develop the colored

people, and (c) by the apprehension of social embarrassments which might result from ecclesiastical mixture." (Page 5.)

This is a candid and friendly expression of a distinguished body of Christian gentlemen, whose observance and experience, in that section of the country in which the negroes are most numerous, have convinced them that the welfare of both races can be best subserved and the cause of religion best promoted by and through separate church relations.

It is therefore worthy of repetition that, in our humble judgment, *the differences in the doctrine and polity of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America are so great as to render the attempted union and merger illegal and void.*

XV.

Civil courts will consider differences in doctrine to determine the validity or invalidity of the proposed union and the ownership of property.

Civil courts will consider differences in doctrine in order to ascertain whether or not the proposed union of two or more churches is allowable in law and to decide the true ownership of trust property belonging to either or any of them.

This was one of the controlling questions in

the Free Church of Scotland case, already cited, and the attempted union considered in that case was by the House of Lords held to be illegal and void because of differences found to exist in respect of the establishment principle and of the Confession of Faith of the two churches there involved.

The Lord Chancellor, in opening his opinion, observed:

> "My Lords, in this case the pursuers complain of a breach of trust, the trust being for the behoof of the Free Church of Scotland, and the breach of trust alleged being the use of certain property being, as alleged, no longer used for the behoof of the Free Church of Scotland, but for the maintenance and support of another and a different body, namely, the United Free Church. That body was formed in 1900, and consisted of a certain number of those who professed to belong to the Free Church of Scotland and others who, up to the time of union, had belonged to the United Presbyterian body. They purported to unite and to exclude from their communion, or at all events, from all participation in their organization, those who refuse to unite in the new body, and have of course, used the funds of which they claim to be the beneficial owners for the use of the new united body. This is the breach of trust complained of, and the question is whether that complaint is well founded." Appeal Cases, 1904, pp. 611-12.

In the course of the learned opinion which follows this general statement of the case, it was stated "that a court of law has nothing whatever to do with the soundness or unsoundness of a particular doctrine," or "any right to speculate as to what is or is not important in the views held," the question for the court being "what were, in fact, the views held, and what the founders of the trust thought important." And again, "but in examining this question (of difference) one has to bear in mind not what we or any other court might think of the importance of the difference, but what the donors of the trust fund thought about it, or what we are constrained to infer would be their view of it if it were possible to consult them;" and further that in ascertaining the difference on the second presented "it is only necessary to put in juxtaposition the language of the Confession of Faith itself, and the statement of doctrine set forth by one component part of the supposed united body, united in one faith and doctrine."

After finding and deciding that the differences heretofore indicated did, in fact, exist, and that they precluded the consummation, in a legal sense, of the proposed union, the Lord Chancellor further said:

> "But there is another and a further ground upon which I think, the appellants are entitled to succeed, and that is, that the so-called union is not really a union of religious belief at all. The united body has united in its organiza-

tions. It has established its various administrative arrangements, has declared its authority as the United Free Church, and in that name has absorbed the various bodies of the United Presbyterians and the Free Churches, as originally constituted; but has it agreed in the doctrines, or either of them, and, if so, which is it that has given way?

"My Lords, I am bound to say that after the most careful examination of the various documents submitted to us, I cannot trace the least evidence of either of them having abandoned their original views. It is not the case of two associated bodies of Christians in complete harmony as to their doctrine agreeing to share their funds, but two bodies, each agreeing to keep their separate religious views where they differ, agreeing to make their formularies so elastic as to admit those who accept them according as their respective conscious will permit.

"Assuming, as I do, that there are differences of belief between them, these differences are not got rid of by their agreeing to say nothing about them, nor are these essentially diverse views avoided by selecting so elastic a formulary as can be accepted by the people who differ, and say they claim their liberty to retain their differences while purporting to join in one Christian Church. It becomes a colorable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say, in effect, there are some parts of this or that confession

which we will agree not to discuss, and we will make our formularies such that either of us can accept it. Such an agreement would not, in my view, constitute a church at all, or, to use Sir William Smith's phrase, it would be a church without a religion, its formularies would be designed not to be a Confession of Faith, but a concealment of such part of the faith as constituted an impediment to the union."

Appeal Cases, 1904, pp. 627-8.

For the reasons stated in his opinion, of which comparatively little has been quoted by us, the Lord Chancellor, four of the other six Lords concurring, reversed the judgment of the court below, declared the attempted union null and void, and adjudged those of the Free Church of Scotland, who protested against the union, though comparatively few in number, to be the rightful owners of the property of that church.

Lord Davey, after disclaiming altogether any right to discuss the truth or falseness of any of the doctrines of the two churches there in question, said:

"The more humble, but not useless, function of the civil court is to determine whether the trusts imposed upon the property by the founders of the trusts are being duly observed.
* * *

"The question in each case is, what were the

religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created. * * *

"The right of the assembly to impose any innovation from established doctrine on a dissentient minority, and the limits of such right (if any) must be found in the constitutional powers of that body, and must be proved by evidence." Ib., pp. 645-48.

The union declared illegal in that case is so much like the one involved in the present case in many of its details, that it would be easy to conclude that this one was purposely fashioned after that one.

In each instance there was a previous and similar declaratory statement, or act, as to the meaning of certain parts of Chapter 3 of the Westminster Confession of Faith; in each instance there was a declared recognition by the committees of doctrinal "agreement," and in each "liberty" of religious belief was reserved and secured (see quotations in the opinions of the Lords), and notwithstanding all this, it was adjudged by the House of Lords that the union there impeached was illegal and void. The so-called union and merger, now under consideration, should likewise be adjudged illegal and void in the present case.

It has been so adjudged in *Landrith* v. *Hudgins, supra; Boyles* v. *Roberts, supra.*

What is known as the Steele resolution,

passed in the General Assembly of the Cumberland Presbyterian Church and a kindred resolution, passed in the General Assembly of the Presbyterian Church of the United States of America, both in May, 1906, and one previously passed by the latter assembly, demonstrate the fact that those bodies then understood the systems of doctrine of their respective churches to remain unimpaired by any supposed revision and that the said bodies desired to pass by their differences in order that the plan of putting the one church into the other might be completed and acquiesced in by Cumberland Presbyterians. Parts of those resolutions are given below:

"Resolved, 1. That in the reunion and union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, on the doctrinal basis of the Presbyterian Confession of Faith, as revised in 1903, the Cumberland Presbyterian Church does not surrender anything integral in its own system of doctrine, as set out in its own Confession of Faith, * * * nor has the Presbyterian Church asked or expected to do so." (Rec., page 100.)

"Resolved, 4. That the assembly, in connection with this whole subject of union with the Cumberland Presbyterian Church, places on record its judgment, that the revision of the Confession of Faith effected in 1903 has not impaired the integrity of the system of doctrine contained in the confession and taught in Holy Scripture, but was designed to remove

misapprehensions as to the proper interpretation thereof." (Rec., p. 650.)

"The General Assembly of the Presbyterian Church in the United States of America, having added to its rolls (according to resolution 8, *supra*) the synods and presbyteries and churches and ministers, lately subject to the General Assembly of the Cumberland Presbyterian Church, and constituting said church, and earnestly desiring to retain in the membership of each particular church every one in connection therewith prior to the consummation of the reunion; and, being apprehensive that some of them may be reluctant to acquiesce in what has now been effected, because of certain misapprehensions which should be removed, if possible, now solemnly declare: First, that in the Presbyterian Church no acceptance of the doctrines of the church is required of any communicant, beyond a personal faith in Jesus Christ as the Son of God, and Saviour of the world, and the sincere acceptance of Him as Lord and Master. Second, that ministers, ruling elders and deacons, in expressing approval of the Westminister Confession of Faith, as revised in 1903, are required to assent only to the system of doctrine contained therein, and not to every particular statement in it; and inasmuch as the two assemblies, meeting in 1904, did declare that there was then a sufficient agreement between the systems of doctrine contained in the confessions of the two churches to warrant a union of the churches,

therefore the change of doctrinal standards resulting from the union involves no change of the belief on the part of any who are ministers, ruling elders or deacons, in the Cumberland Presbyterian Church." (Rec., 135, 136.)

Confessedly the creeds of the two churches were in irreconcilable antagonism prior to 1903, and the majority of the Cumberlands thought they were just as much so in 1906. In the language of the Lord Chancellor, "*differences are not got rid of*" in that way, and it is only "*a colorable union.*" Can an harmonious church be made in this way? Has it any legal efficacy whatever? That it is illegal and void *ab initio*, was decided in the Free Church of Scotland case, and in the other cases just cited.

The full official headnote of the Free Church case is as follows:

"The identity of a religious community described as a church consists in the identity of its doctrines, creeds, confessions, formularies and tests.

The bond of union of a Christian association may contain a power in some recognized body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

The denomination of Christians which called itself the Free Church of Scotland was

founded in 1843. It consisted of ministers and laity who seceded from the Established Church of Scotland, but who professed to carry with them the doctrine and system of the Established Church, only freeing themselves by secession from what they regarded as interference by the state in matters spiritual. Two main fundamental doctrines which the appellants, the minority of the Free Church, asserted that the seceders in 1843 carried with them and issued in their claim, declaration and protest to their supporters and benefactors in that year to stand for all time were the establishment principle, and the unqualified acceptance of the Westminster Confession of Faith, and they further asserted that these doctrines were part of the constitution of the church and could not be altered. In 1843 and subsequent years the response to the appeal for funds was most bountiful, and the Free Church was endowed by the liberality of its members, the property being secured under what was called a "Model Trust Deed." For many years efforts had been made to bring about a union between the Free Church and the United Presbyterian Church, also seceders from the Established Church, but a church pledged to disestablishment. In 1900 acts of assembly were passed by the majority of the Free Church and unanimously by the United Presbyterian Church for union, under the name of the United Free Church, and the Free Church property was conveyed to new trustees for behoof of the new church. The

United Presbyterian Church was opposed to the establishment principle, and did not maintain the Westminster Confession of Faith in its entirety. The act of union left ministers and laymen free to hold opinions as regards the establishment principle and the predestination doctrine (in the Westminster Confession) as they pleased. The respondents contended that the Free Church had full power to change its doctrines so long as its identity was preserved. The appellants, a very small minority of the Free Church, objected to the union, maintaining that the Free Church had no power to change its original doctrines, or to unite with a body which did not confess those doctrines, and they complained of a breach of trust inasmuch as the property of the Free Church was no longer being used for behoof of that church. And they brought this action in the name of the General Assembly of the Free Church, asking substantially for a declarator that they, as representing the Free Church, were entitled to the property.

Held, reversing the decision of the Second Division of the Court Session (Lords Macnaghten and Lindley dissenting), that the establishment principle and the Westminster Confession were distinctive tenets of the Free Church; that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the church; that there was no true union, as the United Free Church had not preserved its identity with the Free Church, not having the same distinctive tenets; and

that the appellants were entitled to hold for behoof of the Free Church the property held by the Free Church before the union in 1910.

By Lord Macnaghten: (1) That the Free Church when it came into existence claimed the power of altering and amending its Confession of Faith, and accordingly could declare the establishment principle an open question, and could relax the stringency of the formula required from ministers and others; (2) that provision for expansion and development was part and parcel of the original trust under which the Free Church funds had been collected, and that there had been no breach of trust.

By Lord Lindley: That any interpretation of the Scripture or of the subordinate standards, *bona fide*, adopted by the General Assembly of the Free Church, and held by them better express the doctrine intended to be expressed by the language used in the Confession, was not beyond the power of the Free Church, and that there was no breach of trust."

Appeal Cases, 1904, pp. 515-6.

One great embarrassment that Cumberland Presbyterian parents must feel in going into the other church will be that, notwithstanding the liberty which is allowed to them with reference to their own religious beliefs, they are required by the directory of worship of that church to instruct their children in the Westminster Con-

fession of Faith and in the larger and shorter catechisms, and to teach them to read and repeat the catechisms. (Const. Pres. Ch., U. S. A., 1906, pp. 431-435.)

Such situation is but mildly characterized when it is called embarrassing. It is worse than that. The parents who do not accept those standards themselves must either live in open rebellion against the positive requirements of the church by refusing to instruct and teach their children as indicated, or they must stifle their own consciences; and, in either case, impaired Christian character and usefulness are inevitable.

XVI.

General Assembly's action not judicial, and if it were, not binding as to civil rights.

It is conceded that the General Assembly of the Cumberland Presbyterian Church has legislative, judicial and executive authority, under the constitution. The same triple authority is recognized in section 110 of the Confession of Faith.

In the exercise of its judical functions its jurisdiction is mainly appellate and not original. This becomes clear from an examination of Section 43 of the constitution, in which it provided, as before seen, that

> "The General Assembly shall have power to receive and decide all appeals, references, and complaints, regularly brought before it

from the inferior courts; * * * to decide in all controversies respecting doctrine and discipline; to give advice and instruction, in conformity with the government of the church, in all cases submitted to it," etc. (Rec., p. 321.)

The same conclusion follows from the very nature of this judicatory, its relation to the church and to the other church courts.

A *judicial* question, whether one of appellate or original jurisdiction, can arise only in a *judicial proceeding;* and there can be no *judicial proceeding*, in a true legal sense, without *a party*, or *parties*, to be concluded by the final *decision* made therein. This, we think, is axiomatic, and does not admit of argument, or call for the citation of authorities.

Therefore, we confidently assert that no action taken by the General Assembly at any time, in refernce to any of the steps leading up to the so-called union and merger, in the supposed conclusion thereof, was *judicial*, and that none of its declarations concerning the same are *judicial decisions*. This observation applies equally to the action taken and the declaration made with reference to the constitution and to the doctrine of the church. Those as to the latter have already been considered in part.

Confessedly, there was no appeal, or reference, or complaint regularly brought before the

General Assembly from any of the inferior courts, nor was any controversy respecting the doctrine and discipline presented to that court for decision. There was no occasion for it to exercise any of its appellate functions. No more was it called upon to exercise any of its original judicial jurisdiction. There was *no judicial proceeding*, either appellate functions. No more was it called upon to exercise any of its original *judicial* jurisdiction. There was *no judicial proceeding*, either appellate or original, before the General Assembly in 1903, or 1904, or 1905, or 1906. No one pleaded or was impleaded. There was *no controversy* to be *judicially decided*, and *no party* to be concluded by a *judicial decision*.

In 1903 a committee on fraternity and union was appointed; in 1904 a joint report of that committee and a like committee of the other church was adopted by the Templeton resolution, heretofore commented upon; in 1905 the special committee to convass the vote of the presbyteries divided, making a minority and a majority report, the latter of which, after the rejection of the former, was adopted, its concluding paragraph being as follows:

"*Be it Resolved*: That the General Assembly does hereby find and declare that a constitutional majority of the presbyteries of the Cumberland Presbyterian Church have voted approval of the reunion and union of said churches upon the basis set forth in said joint

report, and does find and declare that said reunion and union has been constitutionally agreed to by the Cumberland Presbyterian Church, and that the said basis of union has, for the purpose of the union, been constitutionally adopted." (C. P. Min., 1905, p. 39, Successive Steps 37-8.) (Rec., p. 75.)

That resolution is relied on by those favoring union as a *judicial decision* by the General Assembly, and as such binding on Cumberland Presbyterians who resist the so-called union and merger, and on this honorable court "correct or incorrect," right or wrong, just or unjust. That it is *a judicial decision*, is earnestly denied for the reasons just stated, and that it is so binding is denied with equal earnestness for reasons to be stated under subsequent headings.

In 1906 the moderator of the General Assembly of the Cumberland Presbyterian Church, following the language prescribed for him in the joint report just then adopted, made the following declarations:

"The joint report of the two committees on reunion and union and the recitals and resolutions therein contained and recommended for adoption, having been adopted by the General Assembly of the Presbyterian Church in the United States of America and the General Assembly of the Cumberland Presbyterian Church, and official notice of such adoption having been received by each of the said Gen-

eral Assemblies from the other, I do solemnly declare and hereby publicly announce that the basis of reunion and union is now in full force and effect, and that the Cumberland Presbyterian Church is now reunited with the Presbyterian Church in the United States of America as one church, and that the official records of the two churches during the period of separation shall be preserved and held as making up the history of the one church." (C. P. Min., 1906, pp. 71 and 115.) (Rec., p. 285.)

That action and declaration, likewise, are probably relied on by those favoring union as constituting a *judicial decision* by the General Assembly, and as such conclusive against Cumberland Presbyterians who resist it, and on this Honorable Court, "correct or incorrect," right or wrong, just or unjust. That it is *a judical* decision, is likewise earnestly denied for the reasons just stated, and that it is so conclusive is denied with equal earnestness for reasons to be stated hereafter.

The "Rules of Discipline" of the Cumberland Presbyterian Church, found in the Confession of Faith and Government of that church on pages 114-136, and the "Book of Discipline" of the Presbyterian Church in the United States of America, found in the constitution of that church on pages 393 to 422, seem to embrace and define all cases to which the *judicial function* of the respective judicatories of those two churches

extend, and to *require a formal judicial proceeding or controversy,* with *party* or *parties impleaded,* in every instance where such functions are to be exercised and *judicial deliverances made.* Those "Rules" and that "Book" do not contemplate or permit as judicial decisions mere resolutions, like those of the General Assembly, relied on by the unionist in this cause as adjudications by that body.

Section 5a of the Book of Discipline of the Presbyterian Church, U. S. A., is as follows:

> "Every case in which there is a charge of an offense against a church member or officer, shall be known, in its orginal and appellate stages, as a judicial case. Every other case shall be known as a non-judicial or administrative case." (Page 394.) (Rec., pp. 245-7.)

At most the resolution and declaration in question were *legislative* and not *judicial* expressions by the General Assembly, and as such are entitled to less weight than civil courts give to *judicial decisions* of ecclesiastical courts.

> Cooley's Const. Lim., 109-111;
> *Philomath College* v. *Wyatt*, 27 Or., 390.

But, if it were conceded that those acts of the General Assembly were *judicial decisions* by that body to the effect that the so-called union and merger have been "constitutionally adopted" and are "now in full force and effect,"

we would still deny that civil courts are precluded thereby from investigating and deciding for themselves, originally, all questions involved therein, so far as they may affect civil rights.

XVII.

Ecclesiastical decisions not conclusive when civil rights are involved. Civil courts decide civil rights for themselves. Ecclesiastical decisions have no effect, when in subversion of the laws of the society, or when, to give the same effect, the result will be to accomplish that which is inconsistent with or prohibited by the law of the land.

As a final answer to the contentions of the appellants, it is contended by respondents in behalf of the scheme and alleged contract in issue, that the General Assembly of the Cumberland Presbyterian Church, by resolution declared that the scheme was "constitutionally adopted," and that the two assemblies decided by the adoption of the joint report, that there was "such agreement" in the two Confessions of Faith, and such "liberty of belief" allowed "as to warrant the union," and that whether there was otherwise authority therefor or not, the validity of said scheme cannot now be questioned, but that such declaration is conclusive upon this court, and compels it to award the property accordingly to the Presbyterian Church.

As has been already fully explained in this brief, the "such agreement," "as to warrant the

union," clause, is not sufficient upon which to base the transfer of trust property from the use of the one organization for which it was raised, to the use of another organization. It is not a declaration of identity of the two Confessions of Faith and of the doctrines held, and is further beyond the jurisdiction of the church courts, and the civil court is not precluded from inquiring as to whether or not, a diversion of trust property would actually take place thereunder if the same should be given effect.

To now hold, under the facts in this record, that the same with the additional resolution by the same General Assembly that the scheme "was constitutionally adopted," was conclusive upon the civil court and that the civil court is compelled to accept the same is but to allow the church court to violate the personal and property rights of the citizens of the state, as such, and to disregard both the laws of its own organization and of the state as well.

The civil court, itself, is powerless to divert a trust—much less ought a church court to have such power.

The civil court, itself, is powerless to enforce affiliation with and support of any church, involuntarily, by any citizen of the land—and much less ought a church court to have such power.

The civil court, itself, is powerless to dissolve

and destroy an unincorporate body, the purposes and practices of which are not inconsistent with the laws of the land, against the consent of its members, so long as a sufficient number thereof remains, to transact its business and maintain the organization—and much less ought a church court to have such power.

The civil court, itself, is powerless to merge one church or society (voluntary and unincorporate) into another, without the consent of all parties concerned — and much less ought a church court to have such power.

The civil court, itself, is powerless to divest a citizen of his property or civil rights, without due process of law, without the form of a trial—and much less ought a church court to have such power.

It may be that there are circumstances under which the decree or finding of the church court should be accepted by a civil court; but the proposition does not have universal application; it is beset with limitations. It is contended by appellants that this rule finds application, only, when the church court is acting upon some disciplinary or ecclesiastical matter, within the spiritual church, and within its jurisdiction under the laws of the church, and exclusive of any property or civil interest. It has no right to affect property and civil rights, and can only deal with matters spiritual, ecclesiastical and disciplinary within the church. Property and

civil rights belong to the state. The law of the land regulates the succession of church property, according to rules established by it. An ecclesiastical finding can have no effect to override the laws of its own organization or the law of the land, or upon civil and property interests.

A review of the authorities touching such proposition follows herein, and fully maintains our contention.

It follows then, from appellants' standpoint, that the proposition that ecclesiastical decisions and findings of church courts are to be accepted by the civil courts has no application whatever to the facts in this record.

That nothing was done by the General Assembly of the Cumberland Presbyterian Church, precluding this court from inquiring and deciding for itself, both civil and property rights being involved, whether or not the doctrines of the two churches in question are identical, and whether or not the action taken with reference to the so-called union and merger was authorized by the constitution of the Cumberland Church, or in defiance and subversion thereof, and likewise whether said alleged scheme and contract is valid or invalid under the law of the land.

This record presents a controversy, in the General Church case, as to the ownership of certain real estate, being local houses of worship conveyed for the use and benefit of particular

local congregations of the Cumberland Church; also as to the ownership of certain properties held in trust for certain presbyteries of the Cumberland Church in the State of Missouri, and in the college case, presents a controversy as to the ownership and right of control of Missouri Valley College, endowed, maintained and operated by the Synod of Missouri of the Cumberland Church, and the Synod of Kansas of the Cumberland Church; said College with all its property, being situated in Marshall, Saline County, Missouri, and being an incorporate body under the laws of the State of Missouri, all as required by the plan under which the moneys were raised for its endowment and establishment.

The complaint in each case alleges ownership in complainants, and in effect asks that the title to the respective properties be quieted and settled in complainants and such as parties as they represent; and that the defendants and such parties as they represent be temporialy and permanently enjoined from making any claim or asserting any title thereto. The answers in each case deny the claims of complainants, and in effect assert title in defendants and those they represent, and ask that it be so adjudicated and determined. The complainants base their claim upon the alleged scheme and contract in question, while appellants challenge said scheme as invalid and of no effect, and claiming to answer the description of the beneficiaries in the deeds and conveyances under which the respective properties are held, ask the court to construe

and apply the terms of such deeds and other instruments as they would those of any other like deed to real estate or conveyance under which personal property is held.

It is clear, therefore, that this is a case in which property and civil rights are involved.

XVIII.

Ecclesiastical courts may decide for themselves conclusively questions of discipline, and other purely ecclesiastical matters; but in doing so they must observe the customs, usages and laws of the particular church. They cannot decide civil rights at all, nor by their decisions as to ecclesiastical matters affect civil rights in such a way as to preclude civil courts from considering and adjudging for themselves whether or not the ecclesiastical rulings were made in accordance with such customs, usages and laws. Church courts, like civil courts, are bound by the laws through which and under which they exist and perform their respective functions.

The authorities supporting these propositions are abundant—some of them are cited:

Hatfield v. *Long*, 156 Ind., 209;
Smith v. *Pedigo*, 145 Ind., 361;
O'Donovan v. *Chatard*, 97 Ind., 423;
Grimes v. *Harmon*, 35 Ind., 201-254;
Bouldin v. *Alexander*, 15 Wallace, 131;
Perry v. *Wheeler*, 12 Bush, 541;
Lemp v. *Raven*, 113 Mich., 375;

Krecker v. *Shirey*, 163 Pa., 534;
Prickett v. *Wells*, 117 Mo., 502;
Pounder v. *Ash*, 36 Neb., 564;
Bird v. *St. Marks Church*, 62 Iowa, 567;
Kerr's Appeal, 89 Pa., 97;
Jennings v. *Scarborough*, 56 N. J. Law., 401;
Smith v. *Nelson*, 18 Vermont, 511;
Baptist Church v. *Jones*, 79 Miss., 488-582;
Bear v. *Heasley*, 98 Mich., 379;
Bridges v. *Wilson*, 11 Heisk, 458;
Deaderick v. *Lampson*, 11 Heisk, 523;
Nance v. *Busby*, 91 Tenn., 304;
Travers v. *Abby*, 104, Tenn., 665;
Roberts v. *Burnett*, 108 Tenn., 173;
Watson v. *Gargin*, 54 Mo., 377;
Ferravia v. *Vasconcell*, 31 Ill., 35;
Watson v. *Avery*, 2 Bush, 332;
Associate Reform Church v. *Trustees*, 4 N. J. Ch. R., 77;
Gartin v. *Penick*, 5 Bush, 110;
McFadden v. *Murphy*, 149 Miss., 341;
Boyles v. *Roberts*, 222 Mo., 613;
Landrith v. *Hudgins*, 121 Tenn., 556;
Westminister Presbyterian Church v. *Trustees* N. Y., 211 N. Y., 214.

The last case cited, *Church* v. *Trustees*, 211 N. Y., 214, expressly overruled one of the opinions which the lower court followed in this cause and upon the authority of which it in part based its findings, being the *Westminster Church* v. *Trustees of N. Y. Presbytery*, 127 N. Y. Supp., 836-850; 142 App. Div., 851. (Record, p. 716.)

In *Grimes* v. *Harmon, supra,* the court observed:

> "But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church when rights of property and civil rights are involved."

35 Ind 254.

The same language is adopted in *O'Donovan* v. *Chatard,* 97 Ind., 423, and the same principle is applied in the other Indiana cases, cited.

After a review of the Missouri cases, the supreme court of the State of Missouri having this very scheme under consideration in *Boyles* v. *Roberts, supra,* said:

> "And may we now be permitted to add that in our humble judgment, it would be a flagrant violation of constitutional mandates for the civil courts of this state in cases involving property rights, to attempt to hide behind the judgments and decrees of any ecclesiastical tribunal. The duty of our courts in such cases is to investigate the facts, and all the facts bearing upon the issue as to property rights. If that investigation in a measure intrudes upon the decrees of bodies having no authority to pass upon property rights, there is no remedy for it. Of those pure ecclesiastical questions of creed, faith or church discip-

line, we should wash our hands, unless an investigation thereof is required to determine property rights. If for that purpose it should be required, *our constitutional* duty is to investigate. Some of the courts are not as explicit in terms as was this court in the case of *Watson* v. *Gargin, supra,* but from the cases may be deduced the following:

(a) Civil courts will investigate ecclesiastical decrees when it becomes necessary so to do in determining property rights (citing and discussing cases) * * *

(b) And in the investigation of property rights, civil courts will investigate and see that the church judicatory has acted, and if so, whether it has acted within the terms of the constitutional grant of power. If beyond the constitutional provisions of the church, the acts will be declared void (citing and discussing cases) and * * *

(c) In such investigation of property rights the courts will take and compare the two creeds, and award the property to the parties, whether in the majority or the minority, who have adhered to the doctrine and faith which existed prior to the schism or division, (citing and discussing cases) * * *

We shall not quote further under this proposition. Suffice it to say that in determining the question of whether or not property has been diverted from a trust it becomes necessary to show the identity of the organization claiming the property with the organization existing when the trust was created. This

identity is shown by the creed or confession of faith. In each of these cases cited *supra* the courts did examine the creeds to determine the identity of the organization. No more thorough exposition of the Calvinistic doctrine can be found in the law books than in the discussion of the two creeds under review by the House of Lords in the Free Church of Scotland case, *supra*." (222 Mo., 647-655.)

And again:

"The constitution is the contract of association in churches and all unincorporated societies. It is binding upon all portions of the church as well as all judicatories thereof. It is the supreme law of the church and must be adhered to by every part thereof. To pass upon the meaning of such instrument is not dealing with ecclesiastical questions at all, but only determining the meaning of an organic agreement or contract. That these organizations cannot go beyond their constitutional powers is amply shown by the cases." (*Ibid.*, 677.)

In respect of this same scheme the Supreme Court of Tennessee, in *Landrith* v. *Hudgins*, *supra*, said:

"The question simply is whether the determination of an ecclesiastical question by an ecclesiastical body is binding upon a civil court administering the law of the land, in dispos-

ing of property rights, when the correct view of the nature, means, extent, and bearing of such ecclesiastical question is necessary to be determined in order to settle property rights. Another aspect of the same question is, whether the civil court has power to determine whether a particular ecclesiastical body, within the general organization, had jurisdiction, under the constitution or constitutent contract of the ecclesiastical organization, to pass upon the particular question.

If neither the question to be decided in a given case (the ecclesiastical question), nor the power (jurisdiction) of the ecclesiastical court that decided it, is open to examination in the civil court, then there is nothing in any case for the civil court to do except to register the decrees of the ecclesiastical court, and hand over the property to one or the other of the contestants in accordance therewith. *This makes the civil court but the clerk and sheriff of the ecclesiastical court. Such construction puts the civil court in the attitude of declining to consider the terms of the contract on which the rights of the contending parties are based, and to which both appeal.*

The civil courts have no power, under the constitution by which they exist, in this country, to intermeddle with religious matters purely as such, or to assume to settle for contending parties in churches, any question of doctrine, discipline or organization. These are things, wholly apart and aside from the paths to which civil courts are accustomed,

and the fields in which they are wont to work. *But when church organizations buy and take title to property, then they enter the domain wherein civil courts control.* In case any question arises between contending parties or individuals, as to such property, the title, right of possession, or use, that question must be decided by the civil court. It must be decided like any other question, according to the contract on which the right is based.

In order to ascertain the terms of that contract, and its true construction, it may become necessary to decide ecclesiastical or theological questions. If such question has not previously been decided by any tribunal within the church organization, the civil court will decide it according to the best lights obtainable. If it has been already decided by any tribunal of the church appropriate for its decision under the contract, *before* the controversy arose on which the subsequent litigation was based, the civil court will give that decision very great if not controlling weight. To give weight to a rule laid down, or an interpretation rendered, by one of the parties to the controversy, *after* the controversy had arisen, would be abhorent to every sense of right; it would be tantamount to making one party a judge in his own case against the other.

The civil court, in deciding a property right, should honor the deliverances of the ecclesiastical court with the greatest attention and respect, but should not follow it unques-

tionably in every case. If the civil court can see clearly and satisfactorialy that the ecclesiastical court was in error, then it should say so and adjudge accordingly. *It can do no less in view of its obligation to do justice between the parties. It cannot, in discharging its duty to decide on questions of property, hand over its conscience to the keeping of any church organization.* The civil court cannot rightly evade the labor of investigating the questions that arise in such controversies, no matter how difficult or unfamiliar the questions may be, nor can it escape the responsibility, no matter how embarrassing. It is proper that the civil court should act with diffidence, it is true, on such questions, yielding all respect due to the opinion of experts, as upon any subject on which expert evidence is required, but when it clearly appears that the ecclesiastical tribunal is wrong, it should not be followed. *If the civil court look wholly to the ecclesiastical courts for the settlement of the principle, or as the case may be, the facts on which the right of property turns, then the former court abdicates the function in favor of the latter.* The civil court cannot invade the sacred enclosure of the church, and assume to direct her teachings or the administration of her rites and ceremonies or to hinder the imposition of her censures, but where property rights are involved, the church, as to these stands on the same plane with all other persons natural and corporate, no higher, no

lower. The law is over all." *Landrith* v. *Hudgins*, 121 Tenn., 645-8.

In *Gartin* v. *Penick, supra*, the court said:

"A church, like every other organized body of citizens, must be consolidated by an organic law; and, under and according to the Constitution of the United States, the organic law of the Presbyterian Church is a fundamental compact voluntarily made between all members of the unincorporated association, for the guidance and protection of each constituent church and member, *and necessarily inviolable by any delegated power of the aggregate church.*. Its supremacy over all the representative organs deriving their authority from it and therefore subordinate to it, was the great end, and must be the necessary consequence of its adoption. It defines the sphere of the 'General Assembly' as the organized representative of all the members of the Presbyterian Church, as a Christian nationality, *subordinate to the Political sovereignty of the civil union*, which is as supreme over members of churches as over any other citizen. Hence, all acts of the General Assembly not sanctioned by its own, as well as the Federal Constitution are like ultra-constitutional Acts of Congress, void; and that which is void can impose no obligation, even on the conscience.

* * *

The Presbyterian Church is certainly as much bound as Congress by the Federal Con-

stitution; and all of its members are subordinate to that and the State Constitutions, which are supreme over all citizens in every condition. So far as civil rights and duties are concerned, the civil government has the supreme authority to rule; and, to that extent, every citizen of every grade and condition owes a paramount allegiance to that sovereignty, and is reciprocally entitled to its protection over all other human power." (5 Bush., 115 and 116.)

Again:

"'While the general desire of the civil courts is to avoid ecclesiastical or spiritual questions, they find it impossible to wholly do so. If a body of men have wrongful possession of a church or a sum of money, on the pretense, for example, that they are the religious body to which the money or the building, was destined, their opponents have no way of redressing the wrong and vindicating their own right, except by appealing to the civil tribunals of the country; and civil tribunals have no means of doing justice, except by investigating into the differences of doctrine, discipline, or practice, which to the litigants may be religious differences, but to the judge are mere matters of fact bearing on the question of the civil right.' (The Laws of the Creeds of Scotland, p. 323.)

This is pre-eminently true in this country, where all property is secured by the supreme

law of the civil power, and must be protected by the judiciary of that power, which on *all* conflicting claims must decide on the facts, *whatever they may be*, on which the title depends." *Gartin* v. *Penick*, 5 Bush, 122-3.

This language was quoted with approval by the court in *Deaderick* v. *Lampson*, *supra*, as was also another part of the same learned opinion, delivered by Judge Robertson, referring to whom the court in the last case said:

"He then adds, that while courts could not 'control or mould the faith or doctrines of the church nor settle questions of orthodoxy, yet 'so far as the identity of the respective claimants with the beneficiary to whom the church property was dedicated, may be affected by their doctrines, or by the acts of the General Assembly in that case, the essential coincidence of the doctrines and the legal effect of those acts must necessarily be considered for the purpose of deciding the question of title to the property. These principles will sustain the jurisdiction of civil courts in cases like the present, and the views we have above expressed.' " (11 Heisk, 535-6.)

In *Bridges* v. *Wilson*, *supra*, the court observed:

"Ecclesiastical courts have exclusive jurisdiction in matters of church government, church organizations, religious tenets, and the

laws of religious judications with these the civil courts must not and cannot interfere, but must leave them to the free, uncontrolled jurisdiction of the tribunals established by the church. * * * The personal and property rights of churches and their members are civil, and of them the courts of the state have exclusive jurisdiction. Ecclesiastical courts have no jurisdiction to decide the rights of property and enforce its protection." (11 Heisk, 470.)

The last two Tennessee cases from which quotations have just been made are cited approvingly by the same court under a somewhat more extended statement of the rule in *Nance* v. *Busby*, 91 Tenn., p. 313.

In *Watson* v. *Avery*, *supra*, the court said:

"But in none of those cases is it held, so far as we are aware, that where an ecclesiastical body or tribunal had transcended the scope of its authority, and attempted to adjudicate a matter as to which it had no jurisdiction, such adjudication was nevertheless conclusive in a civil court. But in most of the decisions referred to an express or implied reference is made to the jurisdiction of the ecclesiastical court, and the principle decided is limited to subjects clearly within its province, according to the regulations or rules from which its authority is derived." (2 Bush, 347-8.)

Again:

"While we recognize the principle as firmly and correctly established, that civil courts cannot and ought not to rejudge the judgments of spiritual tribunals, as to matters within their jurisdiction, whether justly or unjustly decided, we cannot accept as correct the principle contended for in the argument for the appellees, that whether the synod had jurisdiction and power over the subject on which it acted under the Presbyterial system, is a question purely ecclesiastical,' to be settled by the synod itself and the General Assembly. Such a construction of the powers of church tribunals would in our opinion subject all individuals and property rights, confided or dedicated to the use of religious organizations, to the arbitrary will of those who may constitute their judicatories and representative bodies without regard to any of the regulations or constitutional restraints by which, according to the principles and objects of such organizations, it was intended that said individuals and property rights should be protected.

Especially is this so with reference to the powers of the higher courts of the Presbyterian Church. *Those powers* are not only *defined*, but *limited* by the constitution.

But if it be true, as insisted by the appellees, that the inferior courts and people of the church are bound to accept as final and conclusive the assembly's own construction of its

powers and submit to its edicts as obligatory, without inquiring whether they transcend the barriers of the constitution or not, the will of the assembly, and not the constitution, becomes the fundamental law of the church. But the constitution having been adopted as the supreme law of the church, must be supreme alike over the assembly and people. If it is not, and only binding on the latter, the supreme judicatory is at once a government of despotic and unlimited powers. But we hold that the assembly, like other courts, is limited in its authority by the law under which its acts; and when rights of property, which are secured to congregations and individuals by the organic law of the church are violated by *unconstitutional acts* of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract or the fundamental law of a voluntary association." (2 Bush, 348-9.)

The 2nd and 5th Bush cases, *supra*, are by the same court reaffirmed, in *Perry* v. *Wheeler*, 12 Bush, 541.

The question is discussed at some length, and illustrated by a copious examination of cases in *Bear* v. *Heasley*, 98 Mich., 279, *supra*, the court saying, among other things:

"But it is insisted that the decision of the conference that the new constitution and Con-

fession of Faith had become the fundamental belief and constitution of the society is binding upon this court. The question here involved is one of ownership of property. These proceedings are instituted to recover possession and control of that property. In this class of cases the conclusive effect of church authority, acting within the scope of its powers is fully recognized by all the cases, and it is as well settled that civil courts will not review the decisions of ecclesiastical judicatories upon the merits; but the proposition that the judgments of church judicatories as to their own powers or jurisdiction, or the lawfulness of their methods, are conclusive, is not sustained by reason or the weight of authority."

In the course of the discussion following, the court makes this quotation from Mr. Redfield's note to *Gartin* v. *Penick, supra,* namely:

"We do not understand that any such presumption in favor of the jurisdiction of these church judicatories exists as in the case of the superior court of general jurisdiction in the state or nation; but, on the contrary, everything requisite to create the jurisdiction must be proved affirmatively by any who claim the benefit of their action, as in the case of courts of limited and summary powers within the state, or of all foreign courts, as church courts surely may be regarded."

A part of a note by Mr. M. W. Fuller, late

chief justice of the supreme court of the United States, to the case of *Chase* v. *Cheney*, 10 Am. L. Reg. N. S., 308, is likewise as follows:

> "There can be no question, we apprehend, that an ecclesiastical court must be considered one of special and limited jurisdiction. * * * If such a court be a domestic one, whose judgments can only appear by its record, the jurisdiction of the court, both in regard to the subject matter and the parties, must appear upon the record, and unless it do so appear, the judgment cannot be upheld. It must be further conceded, in regard to ecclesiastical courts in this country that they must, as to civil tribunals of the state or nation, stand upon the same basis as foreign courts." (24 L. R. A., 623.)

The court in *Watson* v. *Garvin*, *supra*, used this forceful language:

> "At the threshold of this inquiry, we are met with the startling proposition that, in cases like this, the judgment or decrees of ecclesiastical judicatories are final and conclusive and that the civil courts have no authority in the premises, except to register these decrees and carry them into execution. It is to be regretted that loose expressions, by elementary writers, and also by judges in delivering their opinions, have given too much foundation for this false doctrine.
>
> "* * * The civil courts are presumed

to know all the law touching property rights, and if questions of ecclesiastical law, connected with property rights, come before them, they are compelled to decide them. They have no power to abdicate their own jurisdiction and transfer it to other tribunals. If they are not sufficiently advised concerning the questions that arise it is their duty to make themselves acquainted with them, in all their bearings, and not to blindly register the decrees of tribunals having no jurisdiction whatever over property."

54 Mo., 377.

In this case the court further said:

"The true ground why civil courts do not interfere with the decrees of ecclesiastical courts, where no property rights are involved, is not bcause such decrees are final and conclusive, but because they (civil courts) have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by those tribunals. This principle forms the foundation of religious liberty in republican governments. The civil authorities have no power to pass, or enforce, laws, abridging the freedom of the citizen, in this regard, and hence in matters purely religious or ecclesiastical, the civil courts have no jurisdictions." (Ib., 378.)

Also:

"But the Presbyterian Church has a written

constitution which their ecclesiastical judicatories have no authority to violate. They are as much bound by the provisions of this constitution, as the supreme law of the church, as the state and Federal governments are by their respective constitutions." (Ib., 379.)

Of like import is the language used in *Smith* v. *Nelson*, 18 Vt., 513, to-wit:

"The proceedings of the synod of the 'Associate Church' as a court of last resort, are not to be held conclusive and absolute in this country, where they come in question, whether directly or collaterally, in courts of law, but their regularity and effect may be examined and determined in courts of justice, upon the same principle which subject the proceedings, either of inferior or voluntary associations to inquiry and adjudications."

In *Ferravia* v. *Vasconcellos*, 31 Ill., 25. the court said, in the course of a lengthy opinion:

"While we will decide nothing affecting the ecclesiastical rights of the church, which we are not competent to do, its civil rights to property are subject for our examination, to be determined in conformity to the law of the land and the principles of equity."

The Supreme Court of Mississippi, in a late case, used this language, viz;

"This court exercises no ecclesiastical juris-

diction. It accepts what the highest ecclesiastical authority in each church promulgates as the faith and practice of that church; that authority, under Baptist polity, being each separate Baptist Church. * * * But the property rights of all churches are within the protection of this court, as are the property rights of citizens of every class. * * *

"It is idle to say that a majority faction which has thus severed its connection with its old faith and organization in the most solemn form possible, first, by such declaration on its minutes, and, second, by reorganizing, in pursurance of that declaration, along the line of a new church, can any longer claim to be the church whose name, whose organization, and whose denominational status such majority faction have, both by words and acts, solemnly repudiated. * * * The property is held in trust by the church for the purpose for which it was dedicated by the donor, and for that purpose alone." *Mount Helm Baptist Church* v. *Jones*, 79 Miss., 488-502.

Authorities could be multiplied at great length in favor of the proposition that civil courts will investigate and determine for themselves the question of jurisdiction on the part of ecclesiastical judicatories when it is sought thereby to affect civil rights, *if indeed, such jurisdiction is possible where civil rights are involved, which we deny.* High on Inj (4th Ed.) 310a, citing *Hatfield* v. *Delong*, 156 Ind., 207. Others are yet to be considered.

In the case of *Chase* v. *Cheney*, 58 Ill., 529, the court said, in reference to the ruling of the church Judicatory:

> "If the court had jurisdiction of the subject-matter and the person, it had the power to proceed." (529.) Again, "The canons must control." (533.)

The main question considered in that case was as to the power of the church judicatory to remove a pastor. The decision was that it had the power, and that it was the judge of its own jurisdiction as to that matter, no civil right being involved. On page 538 the court said:

> "The civil courts will interfere with churches or religious associations when rights of property or civil rights are involved. But they will not revise the decisions of such associations, upon ecclesiastical matters, merely to ascertain their jurisdiction."

Nance v. *Busby*, 91 Tenn., 205, was also a disciplinary case. There the court found as a fact that the complainants had been excommunicated, and, giving conclusive effect to that action of the church, held that they were no longer members and, therefore, could not maintain a suit for the church property. That holding is not in conflict with the contentions made for Cumberland Presbyterians in this litigation.

Perhaps the strongest statement in favor of

the conclusiveness of an ecclesiastical decision to be found in any of the numerous adjudged cases, is that made in *Watson* v. *Jones*, 13 Wallace, 697. But the ecclesiastical action there considered was purely *disciplinary*, being that of the General Assembly of the Presbyterian Church in excluding from its organization the synod of Kentucky and the presbytery of Louisville on the ground of their disloyalty to the government of the United States and adherence to the institution of negro slavery during the Civil War; and in support of the holding that such action was binding on the civil courts, the learned judge delivering the opinion of the court, cited, mainly, if not exclusively, cases in which the ecclesiastical rulings adopted by civil courts related to matters of *discipline* in one form or another, and in which it was uniformly stated, either expressly or impliedly, that such rulings could not affect civil rights.

Certain it is that the court did not decide in that case that a General Assembly could *abandon* the Confession of Faith, constitution and other laws of its church, *extinguish* its organization, *merge* its ministry and membership and property into another church, *surrender* the lower judicatories of the church and then *dissolve and adjourn itself forever;* and preclude all investigation of property rights in civil courts, by simply declaring, as in the present instance, that it was all "*constitutionally*" done.

Judge Taft said it was a *disciplinary* case,

and did not and could not mean that ecclesiastical action, if in violation of the church constitution, was or could be binding on civil courts where property is involved. His language, in part, is:

> "Even if the supreme judiciary has the right to construe the limitations of its own power and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the supreme court, in *Watson* v. *Jones*, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judiciary which is binding on the civil courts."

Again:

> "The question is one of identity, and that identity is to be determined by a reference to the fundamental law of the church which was the original contract or compact under which its organization was effected, and in pursuance of which, and subject to which all the property acquired for its use became vested in the church. An open, flagrant, avowed violation of that original compact, by any persons theretofore members of the church, was necessarily a withdrawal from the lawful organization of the church, and the forfeiture of any rights to continued membership therein and to the control and enjoyment of the property conferred on such organization."

Brundage v. *Deardorf*, 55 Fed. R., 389.

UNITED BRETHREN CASE.

The action taken in 1885 and 1889, and in the intervening years, in reference to the adoption of a revised constitution and Confession of Faith for the Church of the United Brethren in Christ, proved a fruitful source of litigation. One faction of the church affirmed and the other denied the validity of that action, and upon the solution of that question was made to turn the decision of a case in the courts of last resort in several of the states.

The majority of those cases were decided in favor of those who asserted the validity of the action in question and the others were decided against them, and the ownership of the local church property involved in the respective cases was adjudged accordingly. In the course of the opinions in these cases the judges delivering them remarked upon the effect in civil courts of ultimate ecclesiastical action, such as that there under consideration, some of them stating the rule more strongly than others. *In no instance,* however, was the decision rested on the ecclesiastical action alone as *conclusive;* but on the contrary, the court in every case, as the opinions clearly show, considered and decided for itself whether or not the old constitution authorized the revision made, and whether or not it was made as required by that instrument, which was acknowledged to be the supreme law of the church and binding upon all of its members and judicatories.

After this general statement in regard to those cases, it may be well to notice a few of them in detail; and, in doing this we begin with that of *Schlichter* v. *Keiter*, 156 Pa., 119. A commission appointed by the General Conference for that purpose in 1885, reported a revised Confession of Faith and constitution, putting both "in a more connected and logical form," and making them clearer.

> "The revised documents were then submitted to the society for an expression for or against their adoption in lieu of the constitution and Confession then in use. Nearly three years were given for discussion and examination. At the end of this time a vote was taken throughout the society. The returns showed a very large majority of the votes to be in favor of the substitution of the revised forms for the old.
>
> "At the General Conference of 1889 the commission reported its work, the submission of it to the society, the votes for and against its adoption, and submitted the whole to the consideration of that body. In this report twenty-five of its members concurred. One bishop and one other person dissented, and submitted a minority report. The General Conference then referred the majority report to a special committee charged to examine and report whether the commission has followed the instructions given to it, kept within the prescribed limits, and submitted its plan of revision to the society in a proper manner.

"All but two of this committee reported affirmatively and recommended that the bishops should issue a proclamation announcing the adoption of the revised documents, and declaring them to be the Confession of Faith and the constitution of the Church of the United Brethren in Christ. This report was adopted by the decisive vote of 110 yeas to 20 nays. This proclamation was accordingly made, and the revised forms became, thereupon and thereafter, the accepted and binding law of the church.

"Fifteen of the 20 who voted nay—Milton Wright, a bishop, being of the number—withdrew from the General Conference at this stage of the proceedings, and organized another General Conference at another place in the same city, and assumed to be the true general Conference of the whole church, and to have the rightful authority to manage and control all the property. The original body, containing 115 members, kept on in its work. The new body, with 15 members, entered upon a rival system of regulation and control. The local congregation at Green Castle divided over the subject. The majority adhered to the original or majority conference. A minority followed the minority in the conference, organized a new body and took possession of the house of worship and property belonging to the local church, and excluded the majority therefrom."

The majority sued the minority for this prop-

erty which was conveyed to the trustees for the use of "The United Brethren in Christ" in Green Castle, as early as 1828; and the question was: which of the two factions is the legal representative of that Church?

Held. 1. Burden on defendants to show title.

2. That former constitution was valid by acquiescence and use for fifty years, if not otherwise.

3. That civil courts must settle question of ownership of property, and in doing so will inquire, (1) whether or not the constitution authorized change of Confession of Faith and constitution in the manner attempted, and, (2) whether or not changes made were so radical as to destroy identity of plaintiffs with original body.

4. That plaintiffs were regular and entitled to the property, and the defendants seceders and, therefore, without further interest in the property.

(Substance head note.)

In the opinion the court remarked:

"We have attentively considered the suggestions made to us on this subject by the appellants; we have examined the old and the revised Confession; we have read the testimony of the distinguished theological experts who were called to testify as to the alleged doctrinal differences, and we are satisfied that the master and the court were right in deny-

ing the sixth proposition. There has been no substantial departure from the ancient belief of the church. The revision is simply a clear and ample statement of the great doctrines that are to be found in the creed of 1815, or that logically result from them. The 'general usages and distinctive principles of the church' are preserved. Identity in both polity and creed are undisturbed.

"We feel the more satisfaction with this conclusion since it is in harmony with that reached by the court of last resort in matters of faith and discipline, within the church itself viz: the General Conference; and with the conclusion reached by a clear majority of the entire membership. If the question was one of doctrine alone, we should feel inclined to treat the decision of the General Conference as final, in accordance with the rule laid down in several cases, among which are *App.* v. *Lutheran Cong. of Selingsgrave*, 6 Pa., 201; *German Reformed Church* v. *Seibert.*, 3 Pa., 282; *McGinnis* v. *Watson*, 41 Pa., 9.

"Two of the questions raised by the defendants' propositions remain to be briefly considered: First, was the Confession of Faith absolutely unchangeable under the constitution of 1841? Second, if not, was the change made in 1889 so made as to have binding force upon the church? * * *

"The Confession of Faith was not 'absolutely unchangeable' in its manner of expressing the doctrines held by the church. It was unchangeable so far as relates to the distinctive

doctrines or principles actually embodied in it.

"We come, finally, to inquire whether the proceedings of the conference and the commission, and the expression of assent and dissent by the society, are substantially in harmony with the provision of the constitution of 1841, that authorized changes on the request of two-thirds of the whole society." * * *

Thus it appears that the court considered and decided all of the questions affecting the property involved, for itself.

In *Kuns* v. *Robertson*, 154 Ill., 401, and *Russie* v. *Brazzelle*, 128 Mo., 93, the general facts are the same as those stated in the case just cited, and the local facts need not be stated for the present purposes. It is sufficient to say that those cases largely quote and adopt the language of the Pennsylvania court, just quoted by us. Some of this language, as quoted by the Missouri and Illinois courts, will now be given, sentence by sentence, with our contracts between the situation there indicated as to the matters mentioned therein and the situation disclosed in the case now before the court, namely:

"There has been no substantial departure from the ancient beliefs of the church."

Everything is gone in the present instance. There has been no effort here to preserve "*the ancient beliefs*" of the Cumberland Presbyterian

Church. No effort has been made to preserve any part of its Confession of Faith or its constitution in the attempted union and merger.

"*Identity in both polity and creed are undisturbed.*" 154 Ill., 408. Complete destruction of both polity and creed are attempted in this instance; also a complete surrender of the name, corporate and legal rights and powers and organization of the Cumberland Presbyterian Church. All of these were preserved to the Church of the United Brethren in Christ.

"If the question was one of *doctrine alone*, we should feel inclined to treat the decision of the General Conference as final, in accordance with the rule laid down in several cases." 154 Ill., 408. But the question was not "one of *doctrine alone*," and the court, therefore, in each of those cases, and in all the other cases of which we have any knowledge where property rights were involved, *made the investigation and decision for itself.*

The Illinois court in that case likewise quotes a part of the opinion of the supreme court of Indiana, in the case of *Lamb* v. *Cain*, 129 Ind., 486, which was another one of the United Brethren in Christ cases and in which, as in Pennsylvania, Missouri, and Illinois cases, the court examined and decided for itself and upon its own reasons (though citing the rule as to the effect of ecclesiastical decision), that the action taken for and in the adoption of the revised Con-

fession of Faith and constitution of that church, was authorized by the old constitution and that it was taken in conformity to the requirements of that instrument.

One of the concluding observations of the court in *Kuns* v. *Robertson* was:

> "In this case, not only the denominational name, but the cardinal doctrines of faith and the general usages and distinctive principles of the church were preserved." 154 Ill., 415.

How different the present case in which *all of those things*, the organization and all of the property and institutions of the Cumberland Presbyterian Church *are lost forever* to it, if the scheme concocted should be carried out.

The implication is irressistible that if these courts had *found the facts* upon those controlling points to be *otherwise* they would have *decided the cases differently*, as did the Supreme Court of Michigan.

The Missouri court also said:

> "The question on this branch of the case is, did the revised confession as requested by the members and adopted by the General Conference, so change the distinctive doctrines of the church as to destroy its identity, and operate as a perversion of the trust under which the property in question was held? However em-

barrassing it may be, it becomes our duty to determine this question."

Russie v. *Brazzelle*, 128 Mo., 113.

That court, fulfilling its acknowledged constitutional obligation to examine and decide for itself, has, as already seen, considered the scheme here impeached, and adjudged it null and void for reasons stated in *Boyles* v. *Roberts, supra.*

The court in the case of *Bear* v. *Heasley*, 98 Mich., 279, before cited, was one of the same class of cases, and involved the same general questions. That case was decided the other way, and those denying the validity of the new constitution and Confession of Faith were awarded the property involved. In concluding its opinion, the court used this language:

"The edicts and declarations of the conference contravened the organic law of the society, and were *ultra vires*. It has been frequently determined that the title to church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical. Such a perversion the civil court will not allow. It will interpose its strongest arm to arrest it. * * * Courts of law will institute all inquiries necessary to determine who were the real beneficiaries intended, and prevent the diversion of the property to any other usage; and, in so doing, they will, if necessary, investigate the doctrines held or the religious belief of the members,

* * * to identify the persons for whose use the grant or gift was originally intended.'

"The defendants are in possession. They adhere to the old constitution and Confession of Faith. Neither has been lawfully changed. The adherents of the new constitution refused longer to submit to the organic law of the association, and have, in effect, formed a new society. When the conference trampled upon the compact, its jurisdiction ceased to be ligitimate. The right to the property does not depend upon numbers, nor upon the fact that members of the conference whose conduct was revolutionary, were able, by force of numbers, to hold the opera house in which the conference convened, and force those who insisted upon the inlaws, usages, customs and principles, which were accepted among them before the dispute began, are the standard for determining which faction is right. *McGinnis* v. *Watson*, Schnorr's App. and *Ferravia* v. *Vasconcellos, supra.*

Mr. Justice Strong, in his valuable work on the Relations of Civil Law to Church Polity (pages 4, 5, 59), says:

'Cases sometimes arise in civil courts in which it becomes necessary to determine which part of a divided church is entitled to the church property. * * * In such a case, * * * courts of law will inquire which party, or which division, adheres to the form of church government, or acknowledges the church connection designated in the conveyance, and adjudge the right of that party.

* * * That property the civil courts will adjudge to the members, however few in numbers they may be. * * * This rule * * * necessitates an inquiry into the constitution and discipline of the church * * * to enable the court to discover which of the contending parties adheres to the order. * * * When property is held, charged with a trust for the use of a church receiving and maintaining certain religious doctrines, it occasionally happens that its members depart from the faith and embrace other and contrary doctrines, while still claiming to hold the church property. In such a case, if the property can be retained by them, it is diverted from the use to which it was first settled. * * * tegrity of the fundamental law to acquiesce or depart. The question is, which of the two factions adheres to the Confession of Faith and constitution in force when the dispute began—which remains loyal to the compact of the association? The inquiry is not, who went out of the opera house. but who remained in the church, subject to the organic law?"

The same ruling was made in 1907, by the same court in a controversy growing out of the same ecclesiastical action. The headnote in that case is:

"Where a General Conference has disregarded the constitution of the church, its acts cease to be legitimate, and the adherents of

the constitution, however few, have the right of possssion of the church's real estate."

Lemp v. *Raven*, 113 Mich., 375.

The Supreme Court of Oregon, in *Philomath College* v. *Wyatt*, 27 Ore., 390, adjudged the validity of the new Confession of Faith and constitution, as was done in the Missouri Indiana, Illinois, and Pennsylvania cases before mentioned. All of the courts having the question before them considered and decided for themselves whether or not the old constitution authorized the action taken, and the manner in which taken, for the adoption of the new or revised papers. All of them pursued the same course in that particular, though the conclusion reached in two of the cases was different from that reached in the others, different judges having different opinions as to the correct interpretation and construction of the old constitution.

The same ecclesiastical action, taken by the General Conference of the Church of the United Brethren in Christ, was considered in the case of *Brundage* v. *Deardorf*, 55 Fed. R., 839, and again in same case, 92 Fed. R., 214. The first hearing was on demurrer. The court on that hearing said the action considered in *Watson* v. *Jones*, *supra*, was *disciplinary* and held as stated in the second head note, that,

"The decisions of the supreme judicatory of a religious denomination of the associated

class, having a constitution and governed by local, district, state and national bodies, *are not conclusive* upon the courts, when they are in open and avowed defiance, and in express violation of the constitution of such denominations."

The next hearing was on the merits. The court on that hearing stated and considered the case at considerable length and reached the same conclusion that was reached by the state courts which upheld the action in question as within the authority and provisions of the old constitution. Perhaps more weight was given on this hearing to the General Conference's construction of the old constitution than was given by any of the state courts announcing the same general conclusion. The court finally observed that, "The case of *Watson* v. *Jones* is binding and conclusive authority upon *this court*."

It is worthy of remark and special emphasis, in addition to what has been said of these several cases involving the same action:

(1) That the action taken by the General Conference was in terms and intent for the better preservation and perpetuation of the particular church and denomination as a separate and distinct religious organization, and in furtherance of the distinctive principles and doctrines of that organization as a separate church and denomination; (2), that no question as to the *union and merger* of one denomina-

tion with and into another denomination was involved; (3), that the revised constitution and Confession of Faith, approved by the General Conference in that instance, *were written out in full and so submitted* to the members to be voted upon, whereas, in this instance *no revision or amendment was in fact proposed*, and the standards now claimed to have been adopted *were not written out and submitted;* (4), that in no event, in that instance, did the ecclesiastical action *contemplate the destruction or surrender of the church name and organization, constitution and Confession of Faith*, as was contemplated in this instance and must inevitably result if the scheme is carried out. Not only were the controlling questions now before this court *not decided*, or even considered, in any of those cases; but it is fair to assume, from what the courts there said, that none of them would have upheld *such a union and merger* as this record discloses.

The same may be said of *Watson* v. *Jones*, which likewise presented only a controversy between two factions of the same local church and *not the total absorption of one entire denomination by another over the protest of* a large part of the former and considerable portion of the latter.

Referring to the last cited case, the Supreme Court of Indiana observed:

"The case has no application here, because

the division there did not arise out of any *difference in religious faith or belief*, nor was there any claim that either side *had changed their religious belief that on which that church was founded.* But the division was solely on account of differences in political belief. * * * There was not only no case before the court of a church divided into two factions on account of one of them *having abandoned the original faith on which it was founded,* but the court was not speaking of such a case, nor a violation of trust arising out of such a case, by the use of the house of worship by the *departing* majority."

Smith v. *Pedigo*, 145 Ind., 393-4.

It is worthy of repetition that the ecclesiastical action held by the court in *Watson* v. *Jones* to be binding in a civil court was *purely disciplinary.*

Such questions as those that must be controlling in this case were not decided in that one, and could not have been, for they did not arise.

Moreover, that court has never, directly or indirectly, recognized that decision as going beyond the proposition that civil courts will accept as binding on them the disciplinary action of ecclesiastical bodies, such as excommunication of members, removal of officers, etc. Nor do we believe it ever will.

At the December Term, 1872, one year later,

that court, in the case of *Bouldin* v. *Alexander*, 15 Wal., 131-140, without mentioning that case, adopted the rule we have indicated, and examined for itself the other questions involved, being those affecting property rights. A controversy arose in the "Third Colored Baptist Church of the City of Washington," which resulted in a division of the membership and litigation between the two factions for the church house, Bouldin being the leader on one side and Alexander on the other. When the case reached the Supreme Court, that tribinal considered the whole record, *examining and construing and applying for itself* the general law of the particular denomination, namely, the "Baptist Manual" and the "Rules of Church Order" included therein, and *concluded* thereupon that the ecclesiastical action invoked by one faction was *ineffective because not in conformity to that law.*

In the opinion, the court said:

"It is not to be overlooked that we are not called upon to decide who were church officers. The case involves no such question. *What we have to decide is, where was the legal ownership of the property.* The question respects temporalities and temporalities alone. That the *attempt* made on the 7th of June, 1867, to remove the trustees then holding was inoperative, is not to be doubted in view of the facts of the case. Those who held under the deed

were not removable at the will of the *cestuis que use*, and without cause."

15 Wal., 137.

Again:

"This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with the rights of property. As was said in *Shannon* v. *Frost*, 3 B. Monroe, 253, we cannot decide who ought to be members of the church, nor whether the ex-communicated have been regularly or irregularly. We must take the fact of ex-communication as conclusive proof that the persons exscinded are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to ex-communicate others, and, thus inquiring, we hold that the action of the small minority, * * * was not the action of the church, and that it was wholly inoperative. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church, and expulsion of the majority by a minority is a void act. * * * Still more certain it is that they cannot be removed from their trusteeship by a minority of the church society or meeting,

without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules." (Ib., 139-140.)

This opinion is clear and sound and just. It gives full recognition to the rights and powers of civil courts as contradistinguished from those of church courts and properly accords each exclusive jurisdiction within its own peculiar and distinctive sphere. For these reasons and because of a later expression of the same court, this opinion should be followed rather than that in *Watson* v. *Jones, supra*, if and to the extent they may be in conflict with each other.

See also Doctor Dabney's able and masterly review and criticism of the Watson-Jones case in the light of judicial and ecclesiastical history and with reference to the Presbyterian constitution.

Dabney's Discussions, 261-297.

In the very recent case of *Westminster Presbyterian Church* v. *Trustees of Presbytery of N. Y.*, 211 New York, 214, the Court of Appeals of the State of New York, in reversing the judgment brought before it, said:

"The error which as it seems to me, pervades the disposition made of this case in the courts below, is the idea that the presbytery could take away from the Westminster Presbyterian Church of West Twenty-third Street,

all authority and control of its trustees, over its real property, and by hostile action appropriate that property to such uses as it saw fit without any *legal proceedings* to that end, and *wholly by the exercise of the ecclesiastical jurisdiction* of the *presbytery*."

The opinion in the appellate division reversed by the court in said cause (and relied upon and cited as an authority by the court below in reaching its conclusions in the case at bar, record, page 716) proceed upon the theory that the ecclesiastical action of the presbytery in dissolving the congregation as a religious body, had application also to the legal entity and property involved, and was required to be accepted without question by the civil court in a civil action affecting the property.

XIX.

Judicatory cannot surrender church and preclude investigation.

We are aware of no case, and think none can be found, or, if found, sustained, in which a civil court has decided that the majority of a church judicatory or judicatories may, over the protest of the minority, *surrender* the denomination represented with all it has to another denomination and at the same time by an ecclesiastical declaration in that behalf preclude civil courts, where civil rights are involved, from inquiring whether or not such surrender was authorized by the constitution of the church surrendered.

That such a thing cannot be done has been distinctly held in *Boyles* v. *Roberts*, 222 Mo., 613; *Landrith* v. *Hudgins*, 121 Tenn., 556.

If the General Assembly had such power as that, it could have merged the church into any pagan society, or into any business corporation, and the civil courts would be powerless to reclaim the property for those who still adhered to the church.

Before this scheme *very few* of the many adjudged cases involved the question of *union or merger* in any degree. The two most pointed cases involving such a question (the Scotch case, L. R. Appeal Cases, 1904, p. 612, and the 4th New Jersey Equity case, 4 N. J. Ch., 77), have already been cited as authority against the validity of such an act. They involved two, one each of the only three "plans" of church union hitherto considered by civil courts and they were both adjudged void.

Of the prior cases cited as authority on the other side of the question, the strongest one is that of *McBride* v. *Porter*, 17 Iowa, 203, heretofore referred to. That case involved the other one of the three "*plans*" of church union hitherto brought to the attention of the civil courts; and, though the *plan* was held to be void, the opinion of the court does not negative the proposition just laid down by us, or afford any real support for the *union and merger* now under consideration. There it appeared that a union

had been formed between the Associate Church and the Associate Reformed Church, being *of the same faith and order*, under the *name of the United Presbyterian Church* of North America; and that, thereafter a litigation arose between the two factions of a local congregation of the Associate Church, known as the Pleasant Divide, about the ownership and control of the local house of worship.

In deciding the case the court did exactly what we ask this honorable court to do, in that it *examined and construed the church constitution for itself* and *adjudged the trust according to the terms of the deed* creating it. The judicatories of the Associate Church were, session, presbytery and synod, in the order named, the last being the highest. The court, in deciding the case, among other things, said:

> "The synod *had the power, according to the constitution and form of government* of the Associate Church, to form the union."

17 Iowa, 210.

It is logically and legally impossible that the identity of each of the two original organizations could have been and are preserved in the new organization. There must have been either tions could have been and are preserved in the an *absorption* of the one church by the other, as has been attempted by the scheme now under consideration by this honorable court and as

was held to be true of that considered in the 4th New Jersey equity case, or a mutual surrender by both of important organic powers and functions. Obviously they were not both the same after the union that they were before. Previously each of them was separate, independent and *sovereign* in its own sphere; afterwards only one of them was so. Besides, the two churches involved in the present controversy are not of the *same faith and practice*, but widely different, as before insisted; and finally the Cumberland Presbyterian Church was not expected to go into the other church *upon equal terms* with it, but was expected to make a *complete surrender* of its identity and of all it had to the other church, whose identity alone was expected to be preserved; and such are the plain terms of the plan adopted by the General Assemblies in 1904 and of resolutions passed in 1906, as before seen.

McGinnis v. *Watson*, 41 Pa., 13, is the next strongest prior union case relied on by our adversaries. The union there considered, being the same one considered in *McBride* v. *Portr, supra*, was upheld; but in making its decision the court considered the question of power to form the alliance, and found, as it thought and held, that the action of the synod and presbyteries, *when judged by the constitution and usages of the church*, had not been brought about *by any excess* of usual and legitimate authority on their part, and was not such a *departure from its usages and laws* as should bring condemnation upon that action.

Referring to that case, Judge Sharswood, in the course of his opinion in Schnorr's Appeal, 67 Pa., 138, remarked:

"If the opinion of Chief Justice Lowrie in the last case seems to controvert any of these positions, and to hold that a congregation may change a material part of its principles or practices without forfeiting its property, on the ground that to deny this 'would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life,' and because the guarantee of freedom of religion forbids us to understand the rule in this way, I ask leave most respectfully to enter against it my dissent and protest. I do so the more freely because it was extrajudical to any question in the case. Courts which have the supervision and control of all corporations and unincorporated societies or associations must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. *The guarantee of religious freedom has nothing to do with the property.* It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intel-

lectual and spiritual life is not the higher law, but must yield to the law of the land."

The entire opinion in Ramsey's Appeal is in these words:

"*Per curiam.* This case appears to fall within the decision in the case of *McGinnis* v. *Watson*, 5 Wright, 9. The case is not well reported, but the opinion of the court seems to cover this case."

68 Pa., 63.

The ecclesiastical action considered in the case of *Trinity M. E. Church* v. *Harris*, was in no sense a union between two separate denominations, but only a consolidation of three neighboring congregations of the same denomination.

The court considering that action found and held that the Bishop making the consolidation had authority and power conferred upon him by the book of discipline of the Methodist Church of America so to do. In that case the court cited the rule as to the effect of ecclesiastical decisions, but at the same time examined the laws, usages and practice of the church and found them to support the action of the Biship. Whatever else may be said of that case it is not applicable on the question of union and merger such as involved in the present controversy.

73 Conn., 216.

Central University of Ky. v. *Walters*, 90 S.

W. R., 1066, is also referred to as a union case. It is not so, however, but only a consolidation of two colleges in Kentucky under a statute of that state. The opinion of the court in that case is not in conflict with our contention in this case, for it was there held as the ground of decree that there had been *no change* in the use and purpose of the trust fund in litigation—the *use and purpose* of that fund and *the name* of the institution and *of the particular chair* to which that fund was devoted by the donor *were perfectly preserved* and remained the same after the consolidation as before.

Smith v. *Swormstedt*, 16th Howard, 289, was not a union case, but on the contrary, a case of separation of the M. E. Church of the United States into two parts in the year 1844, for reasons and upon terms recited in the opinion, and which need not be stated or commented on by us at this time.

XX.

Courts of equity protect Trust property. The property in question is trust property. The deeds to the lots, which these houses of worship stand, creat valid trusts for the respective congregations described therein, of the Cumberland Church, and such property cannot be diverted to the use of the Presbyterian Church.

Religious trusts may be created by gifts or conveyance to certain persons in trust for the use and benefit of a particular religious con-

gregation, body or society by its denominational name; all interest therein will be lost by those who voluntarily leave it and go into another organization; and courts of equity will protect it for those who remain members of the original organization.

The Cumberland Presbyterian Church, from its organization to the present day, has represented and promulgated distinctive religious doctrines, on the middle ground between Calvinism and Arminianism. The word "Cumberland" in the name of this church, has, from the beginning, distinguished it from all other churches, and been understood as signifying its distinctive doctrines as a separate and independent denomination of Christians.

Therefore the conveyance of property to particular trustees or officers of a particular congregation of that church in its denominational name, or to any particular presbytery or particular synod or synods by name, will be presumed and held to have created a specific trust for the benefit of such congregation, presbytery or synod and for the support therein of the distinctive doctrines of that church.

Smith v. *Pedigo*, 145 Ind., 361;
Mt. Zion Baptist Church v. *Whittmore*, 83 Iowa, 147;
Park v. *Champlin*, 96 Iowa, 55;
Hale v. *Eberett*, 63 New Hampshire, p. 9;
Schnorr's Appeal, 67 Pa. St., 138;

Finley v. *Brent*, 87 Vir. 103;
Nance v. *Busby*, 91 Tenn., 305;
Bridges v. *Wilson*, 11 Heisk, 458;
Mt. Helm Baptist Church v. *Jones*, 79 Miss., 488;
Landrith v. *Hudgins*, 121 Tenn. 676-7;
Boyles v. *Roberts*, 222 Mo., 613.

The following quotation from *Smith* v. *Pedigo*, *supra*, illustrates the doctrine contended for in all the cases cited:

> "No principle is better settled, than that property conveyed to trustees for the use of a church by its denominational name as was the case here, creates a trust for the promulgation of the tenets and doctrines of that denomination."

A change from one denomination to another, though different in name only, is a change or a breach, that results in the loss of property held in the former denomination.

Godfrey v. *Walker*, 42 Ga., 562.
Deaderick v. *Lampson*, 11 Heisk, 523;
Bridges v. *Wilson*, 11 Heisk, 457;
McKenney v. *Griggs*, 5 Bush, 401;
Newman v. *Proctor*, 10 Bush, 318;
Brown v. *Mason*, 80 Kentucky, 443;

In the case of *Kinley* v. *Brent*, *supra*, the court considered the effect of an effort at corporate union between the two denominations of

Methodist Protestants and Methodist Episcopalians in Virginia, upon property conveyed "for the sole and exclusive use and benefit of the religious congregation of the regular Orthodox Methodist Protestants which may hereafter assemble" to worship at Heathsville, Virginia.

The court held that a trust had been created for the use and benefit of the particular congregation of Methodist Protestants, and that the majority of that congregation could not unite, or by the proposed union, be united with the other church and take the property with them. (87 Va., 103.)

Such a trust cannot be diverted at all, either by the majority of the local congregation in an association of the congregational class, or by the action of successive judicatories in a religious society of the associated class. The trust in such a case is fixed by the deed, and must, in every event, be administered accordingly.

The rule is universal that going into another organization is, in law, an abandonment of all previous property rights by those who go, and that those who maintain the original organization thereby become the sole beneficiaries, as the only persons answering the description of the deed. (Same authorities as above mentioned.)

The local church properties and the presbyterial properties described in the bill of complaint in the General Church case herein, belong respectively to the local congregations of the

Cumberland Presbyterian Church, and to the presbyteries of the Cumberland Presbyterian Church described in said bill; likewise in the College case, the College properties described in the bill of complaint belong to the Synod of Missouri of the Cumberland Presbyterian Church. These properties are all trust properties. Accepting the creed and doctrinal positions set forth in the Confession of Faith of the Cumberland Presbyterian Church as in harmony with their conscientious convictions and religious beliefs and relying upon the provisions of the written constitution adopted for the government and control of the church as an organization, to secure their full protection, the members of this church, under many hardships and perils, laid its foundations deep and strong at an early day in the great states of Tennessee and Missouri, from whence, afterwards it spread to the present time through numerous states and sections of the land. They gave of their time and their money for its enlargement and its growth. They supported its ministry and benevolences through a century, with unfailing zeal. They gathered a membership, which, despite the ravages of time and death, the inroads made by emigration and change of resident memberships to bounds beyond the habitation of the church, in 1906, amounted to practically two hundred thousand. It is safe to say that within the century of its existence over a million souls enjoyed fellowship as members therein.

Relying upon the written constitution and

Confession of the church, as the great charter of the trust, and as setting forth the terms thereof, and for their protection in the support thereof, they have for a century been contributing to the trust, for the spread of the religious belief and doctrine as contained in their Confession, and in the manner as prescribed by their constitution, and for the enjoyment of the same, in their especial society, with their money and property; they have been sending forth and supporting its ministry, building church houses for its use and the enjoyment of its public services, and endowing, building, establishing and operating schools and colleges for its use, and the advancement of its particular cause.

Missouri Valley College, involved in the one complaint herein, and each and every church house and property involved in the other herein, together with hundreds of others in the State of Missouri, were raised and are being maintained upon this exact same trust. They were built and endowed with moneys contributed and raised in trust for the use of the respective bodies of the Cumberland Presbyterian Church, and the membership thereof in whose names the same is held, on the faith of the written constitution of the church and the protection of the provisions thereof.

So that we contend that the constitution is and must be supreme as a civil contract, and to now violate and disregard it, is to overthrow the trust, upon which, all the property which the

church as a whole or any of the bodies or local congregations thereof, now holds for use, or for the use of any respective body thereof, was donated and acquired and is now being held.

Not one dollar of this property, the property involved in either bill of complaint herein, was ever given or donated for the use of the Presbyterian Church in the United States of America, or for any purpose under its jurisdiction. It was given for the use of the Cumberland Presbyterian Church or the different bodies thereof as separate organizations, and to be held according to the constitution of the Cumberland Church, and for the purpose to be executed and to be realized by it as a separate society. In not a single *deed* or *conveyance* under which any of this property is held—is the *Presbyterian* Church mentioned.

Not a single word or line to indicate that in any event, remote or otherwise, that it should ever pass to the use of the Presbyterian Church, for any purpose whatever, or should in any event be subject to its jurisdiction. Not a single line in the *constitution* of the church to indicate that in any contingency, remote or otherwise, any of the property to be acquired for its use, or for the use of any minor judicatory or other body thereof, should ever in any event, be passed to the jurisidiction of the Presbyterian Church or any other church, than the one for which it was being contributed and raised, the Cumberland Church, or that it should ever be subject to the

uses and purposes of any other society, even though with the exact same creed and beliefs.

XXI.

Property of local church is protected as such.

Whatever else may be said of the so-called union and merger, we insist confidently, that the local church house property involved in the General Church case belongs to the local congregation, or to that part of it adhering to the Cumberland Presbyterian Church, as it existed when the deed was made, and that it cannot be taken from them by any means whatsoever. The conveyances under which the same are held are for the benefit of the particular local church as such, and without reference to its connection with any other ecclesiastical society. The particular property is for the use of the particular local church for a particular purpose, and only those who are members thereof, have any interest in the particular property.

Gibson v. *Armstrong*, 7 B. Monroe, 49;
Deaderick v. *Lampson*, 11 Heisk, 529;
Bridges v. *Wilson*, 11 Heisk, 458;
Rodgers v. *Burnett*, 108 Tenn., 173;
Newman v. *Proctor*, 10 Bush 318;
Brown v. *Monroe*, 80 Kentucky, 443;
Gartin v. *Penick*, 5 Bush, 112;
Harper v. *Straws*, 14 B. Monroe, 39;
Watson v. *Gargin*, 54 Mo., 343;
Mt. Helm Baptist Church v. *Jones*, 79

Miss., 488;
Finley v. *Brent*, 87 Va., 103;
McBride v. *Porter*, 17 Iowa, 207;
Godfrey v. *Walker*, 42 Ga., 562;
Boyles v. *Roberts*, 222 Mo., 613;
Landrith v. *Hudgins*, 121 Tenn., 626.

No other local church has any intrest in this property; nor has the church at large or any of its judicatories, the power to divert it to the use of any other congregation, even of the same church and much less to that of another church. Such power is not found in the deed, or in the church law. It does not exist. By the constitution of the church the local property of one congregation can only be subjected to the use of another congregation within the same church by the consent of the congregation itself. Thus among the powers of the presbytery under the constitution of the church, we find the following recited:

"To unite or divide churches with the *consent* of *a majority* of the *members* thereof." (Rec., p. 319.)

In *Gibson* v. *Armstrong*, *supra*, it was said:

"When property is conveyed to a particular church without reference to its connection with any other society or body, the majority of the church are the beneficiaries who remain under the organization then existing. * * * An African church holding property as such,

independent of any dependence upon any other church organization, cannot by the chancellor be subjected to any control or supervision of any such organization to which it is not subjected *by the deeds*, through which the property is held."

Harper v. *Straws*, 14 B. Monroe, 48.

To the same effect is *Rodgers* v. *Burnett*, *supra*, *McBride* v. *Porter*, *supra*, and the other authorities mentioned.

In the *deeds* now under consideration there are no conditions or limitations, nothing to prevent the local congregations of the Cumberland Presbyterian Church from controlling the local property absolutely and without reference to the action of any other body or bodies. Thus the deeds are practically as follows:

"To G. E. C. Sharp (and others, naming them), trustees of the Cumberland Presbyterian Church of Marshall, Missouri, and their successors." (Rec., p. 558.)

Thus, in *Watson* v. *Garvin*, 54 Mo., 357, the court said in passing upon deeds of the same characted as this here involved:

"It is not pretended that the property in dispute is held under any express condition of subordination by the *cestuis que* trust to any church judicatory. The deeds under which

the property in dispute in held, conveyed to trustees 'in trust for the congregation of the First Presbyterian Church of St. Charles.' * * * There is nothing in either deed which requires that the congregation should be under the control of any superior judicatory." (Ibid, 357.)

"We have seen that in the Presbyterian Church, the General Assembly may cut off or dissolve presbyteries. But I have never known a case in any civil court, where it has been held that a resolution of a high ecclesiastical judicatory, cutting off a lower one, whether by direct expulsion or conditional dissolution like the *ipso facto* ordinance, operates as a confiscation of the property of the local congregation held for their own use with no special trust, in case they do not withdraw from such exscinded body, or that it operates as a transfer of such property to new organizations created under authority of the exscinded power. It may be for the peace and good order of the church that such a power be lodged in the general representative body—of that we can know nothing—but to suppose that it carries with it the power to thus change the titles to all the property of the local congregations, would give it a scope and effect hitherto undreamed of ." (*Ibid*, 366.)

Again:

"It has always been a disputed point between the adherents of different ecclesiastical

systems as to how much authority, or* whether any at all, should be given to a central power. Upon ecclesiastical matters, each must decide for itself. But no man or association of men can be *deprived of property except by the law of the land.* It is true that trusts pertaining to property held for ecclesiastical uses will be protected like other trusts and their proper administration enforced; but every presumption is in favor of the right of the local congregation to the continued use of property purchased and improved with its funds and held for its benefit, and that right will only be forfeited as a penalty for violating the conditions of the trust. That violation must be positive, affirmative action and cannot be predicated upon a position into which the congregation is thrown against its will, and by a summary existence of power without judical investigation." (*Ibid.*, 367.)

And again:

"But if this act of the General Assembly and the exscinding decree pronounced against the defendants be treated as within the scope of ecclesiastical authority, such excision surely ought not have the legal force of cutting off the property rights of the defendants. * * *

At the time the exscinding decree was pronounced they undoubtedly were beneficiaries entitled to the property in dispute. When this presbytery was cut off, their property was cut off with them. If they had property in

their treasury to pay their minister or other expenses of the church, that money was cut off with them, and still remained their property subject to their disposition; and in like manner the church edifice and parsonage remained theirs as they were before the excision. If this *ipso facto* self-executing decree had the effect of destroying existing property rights, it could only do so by over-riding the plain provisions of the bill of rights of our State and Federal constitutions, which declare, in substance, that no person can be deprived of his property without due process of law; and that private property cannot be taken for public use without just compensation; and that means, that private property cannot be taken at all, except for public use, and then only on payment of a just compensation. How could the existing property rights of the defendants be transferred from them to the plaintiffs without the form of trial, and without any power in the judicatory to act on such rights? It would seem to be a ridiculous farce to hold that the plaintiffs being a part of the original congregation could separate themselves into a distinct organization and then have themselves declared by an *ex-parte* decree the exclusive owners of the property. If that could be done by a part of a congregation, why could it not be done by strangers to the congregation, or emissaries from other states erecting themselves into a Presbyterian congregation and then calling themselves by the same name and having themselves pronounced

by the presbytery the only genuine congregation, entitled to the treasure and property of the old congregation? Courts of justice are made to protect parties in the enjoyment of their rights of person and property, and not to destroy them by unholding such contrivances. *But the deeds themselves, by which the property in dispute is held, show the rights of these parties. It was to be held for the use of the congregation—that is, for the members of the church composing the congregation.. They can only cease to be members by voluntarily withdrawing, or by excommunication. They have not withdrawn nor have they been excommunicated.. They are still Presbyterians of the same faith and forming a part of the same original congregation; and as such are entitled as beneficiaries under those deeds to their interest in the property.*" (*Ibid.*, 381-2.)

A Presbyterian Church, called "Bethel Union," was organized in Marion County, Kentucky, in the year 1828. In 1857 a piece of land was conveyed to certain persons, in trust for its use, and on that ground was erected a new house of worship. "That dedication was to 'The Bethel Union Church' without any other description or limitation."

The six presbyteries in Kentucky, with one of which Bethel Union Church was affiliated, were exscinded, as were the presbyteries in Missouri, by operation of the "Gurley *ipso facto* order."

A controversy arose among the members of Bethel Union Church about that action of the General Assembly; and its adherents, claiming to be the exclusive owners of the property, sued the others to enforce that claim. That was the case of *Gartin* v. *Penick, supra*—from which liberal quotations will hereafter be made in reference to the constitutional powers of the Presbyterian Church in the United States of America.

As to its duty to construe the deed and enforce the trust in favor of those adhering to the original local organization, the court said:

> "From the pleadings and proofs, the judicial deduction is inevitable that the appellants and the appellees, as now organized, constitute separate and antagonistic churches, each claiming to be the church to which the property in litigation was dedicated; and, consequently, the question now to be decided is one of identity, involving in its solution the equitable title to property *dependent on contract,* which this court must, when as in this case, appealed to, interpret and uphold as well between ecclesiastical as civil bodies, or any other parties. The contract is purely civil, and not ecclesiastical, and the usufructuary rights resulting from it depends on the laws of the land, and not on the arbitrium of the General Assembly of the church, which has no civil power; but within the limits of the political and ecclesiastical constitutions, has supreme

and final jurisdiction over church doctrines and discipline."

Gartin v. *Penick*, 5 Bush, 123-4.

Also:

"Then the appellants constitute the identical church to whose use the deed of 1857 dedicated the property, although they do not adher to the General Assembly, but stand independently of it, *as the same church, including the appellees, did, when the deed was made.*" (Ibid. 125.)

Also:

"The inevitable conclusion is, that the General Assembly itself forced the disememberment of the Presbyterian Church by acts which are void for want of higher authority; and, consequently, even if the appellants held their interest in the church property by tenure of adherence to the assembly, a severance of that connection by the unauthorized acts of the assembly cannot affect the title to the property. They are still, in every essential element of identity, the same 'Bethel Union Church' as always hitherto. There might be more reason for saying that the General Assembly has lost its own identity." (Ibid, 136.)

In the case of *Finley* v. *Brent, supra,* the

court considered the effect of an effort at corporate union between the two denominations of Methodist Protestants and Methodist Episcopalians in Virginia, upon property conveyed "for the sole and exclusive use and benefit of the religious congregation of regular Orthodox Methodist Protestants which may hereafter assemble," to worship at Heathville, Virginia. The court among other things, said:

> "It is the province of the courts to construe contracts as they are made. One party claims to be the party described in the deed, the other admits that it is not, but claims that a majority of the congregation, whom it represents and claims under, have left the Methodist Protestant Church and joined the other church denomination named above, and taken the church property with them. Did the majority of the congregation have the power to alter and change the terms of trust? If so, whence was it derived? Certainly not from the terms of the grant. These Christians could change their religious faith, had the right to go to any denomination to which their belief or choice led, and they could take with them all property which belonged to them, but they were without power to change the character of the trust in question.
>
> The question at issue here is not new in the courts of this commonwealth, and cannot be said to be an open question in this court. In the case of *Boxwell* v. *Affleck*, 79 Va., 407,

this court citing with approval *Hoskinson* v. *Pusey*, 32 Gratt, 431, said:

'This court has said upon a similar question, in *Hoskinson* v. *Pusey*, the deed is the same in substance as the deed in *Brooke* v. *Shacklett*, 13 Gratt, 301, and the construction must be the same. According to that construction the conveyance is not for the use of the Methodist Episcopal Church in the general sense. Such a conveyance in this state would be void, but it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term; that is for the members as such of the congregation of the Methodist Episcopal Church who, from their residence at or near the place of public worship, may be expected to use it for that purpose. Such a conveyance is valid under our statutes. See Code 1873, Chap. 76, Sec. 8. Who are the beneficiaries of the control and use of the church buildings? Looking to the deed alone, the answer would be those who are members of the congregation or local society, and as such members of the Methodist Episcopal Church.' In this case, the appellees do not claim to belong to the Methodist Protestant Church at all, but they claim that a majority of the congregation have decided to belong to a different denomination altogether, and they no longer answer the requisites of the trust, and they, under the terms of the deed, can claim no benefits under it. Who, then, are the *cestuis que trustent* under the deed in question? The beneficiaries entitled

to the trust estate? Looking to the deed alone, the answer would be those who are members of the congregation or local society, and as such members of the Methodist Protestant Church."

The court held in *Deaderick* v. *Lampson, supra,* that the church property there in question was for the use of the "Jonesboro Presbyterian Church" in its original connection as a local congregation, and that a portion of the members could not take it into another Presbyterian denomination.

The headnote in *Bridges* v. *Wilson,* 11th Heisk, 458, is as follows:

"While secular courts have nothing to do with, or jurisdiction over, questions of church government, organizations or religious tenets, yet questions of title to Church edifices and property belong exclusively to the civil courts, and must be determined by the same rules established for interpreting deeds and instruments made in relation to non-religious objects. The intention of the grantor of the lot in question is to be carried out. It is manifest that he meant the trustees named and their successors should only hold the naked legal title of the lot, for the benefit of the body of worshippers of the Presbyterian Church of Mars Hill, in Athens. Therefore the surviving trustee and elders of the church as elders, without passing upon any question

ecclesiastical in regard to them, had no interest in the lot which they could transfer away from the body of worshippers. The church edifice and lot can only be disposed of by the church as a church—that is, a body of worshippers—by complying with the provisions of the grantor's deed, and as authorized by the laws and constitution of the church itself."

The deed under construction in that case was made in 1837, the year before the division of the Presbyterian Church in the United States of America into what was called the Old School and New School branches of that church. In that division Kingston Presbytery went with and became a part of the New School branch, the local church for whose benefit that deed was made being within and a part of Kingston Presbytery. The deed conveyed the property to certain named persons, "ruling elders in the Presbyterian Church at Athens, Tennessee, said church known by the name of Mars Hill Church, * * * and their successors in office, for the use of said Mars Hill Church, * * * in trust, to be used and enjoyed by said church, as a site for the erection of a house to worship in, otherwise, as may be deemed most advisable and as most for the good of the church."

In the year 1857 the Southern constitutency of the New School branch separated from its General Assembly and formed the United Synod, which in 1864 went into what is now the

Southern Presbyterian Church. For a time Kingston Presbytery as a part of the United Synod was likewise in the latter church; but in 1865 some efforts were made by some of its members, including one of the elders of the Mars Hill Church, to take that presbytery back into the Presbyterian Church in the United States of America. In the suit it was claimed on the one hand and denied on the other that the changing of Kingston Presbytery from one higher connection to another was controlling as to the local church at Athens and as to the true ownership of its property. But the court treated that change and others as immaterial and held that the property belonged to the local church, as such, according to the language and terms of the deed. At the close of the opinion the court said:

> "Carrying out the purpose of the grantor, the law will continue the property in the members of the religious body designated, (i. e) the Mars Hill Presbyterian Church at Athens, unaffected by its transfer from jurisdiction to jurisdiction in church government, unless the church, as a church, see proper to dispose of it under the provisions of the deed, and as authorized by its constitution and laws."

11 Heisk, 471.

The deeds for construction in the present case are practically the same as that construed in the case last cited, the dedication being made for the use and benefit of a particular local congregation of the *Cumberland Presbyterian Church.*

There is no condition of limitation in it. It creates a *trust* for the use and benefit of the local Cumberland Presbyterian Church, named, as such; and allows no change from one organization to another.

The terms of a deed to a church, like those of a deed to an individual, are controlling in every instance, and should be so; only those persons who at the time answer the description of the deed can legally or justly claim to be beneficiaries under it. *Present* membership in the local *church* named in the deed, and as there designated, is essential, and that alone is essential, to make one a beneficiary of the trust. Cessation of membership inevitably works a cessation of interest in the property.

Why should these deeds be construed by a rule different from that universally applied in other instances?

The Cumberland Presbyterian Church still survives, locally and generally. It has its General Assembly, its synods, its presbyteries and its local churches, including that now before this court; with a membership, as its friends believe, aggregating about 125,000.

This record shows that it is not dead; though this court is asked to say that it is.

In *Landrith* v. *Hudgins*, *supra*, the court, having under consideration a deed of the same character, said:

"The property involved in the present controversy was conveyed by Moses H. Bonner 'to the officers of the Cumberland Presbyterian Church and their successors in office for the use and benefit of the said Cumberland Presbyterian Church'; expressing a consideration of $600.00, and describing the property. * * *

The conveyance created a trust in favor of the Cumberland Presbyterian Church at Fayetteville, that is, the members of that church, and their church, and their successors, composing the congregation of that church. The doctrines intended to be promulgated in its use are indicated by the terms 'Cumberland Presbyterian.' These terms indicate the doctrines and polity of that church, and it is apparent from the record that the property was so used from the execution of the deed in 1852 continuously until the recent trouble arose. In the creation of the trust we do not think it material that it had its origin in a conveyance for a monetary consideration instead of a donation. The persons paying the consideration, whether the members of the church, or others, for them, would be regarded as having had the deed executed by the maker of it for the purpose expressed therein, and the trust so created to the intent and in the manner above indicated. * * *

Our conclusion on the whole case is, that the proceedings taken for union were not effective to merge the Cumberland Presbyterian Church into the Presbyterian Church

in the United States of America that the Cumberland Presbyterian Church still remains a vital, and independent organization, with a General Assembly, synods, and presbyteries; that the defendants are truly identified therewith in doctrine, polity, and organic subordination; that the complainants are not so identified, but have united themselves with another and different ecclesiastical organization; that the defendants are entitled to the church property in controversy at Fayetteville, and that complainants' bill should be dismissed with costs."

121 Tenn., 677 *et seq.*

In *Boyles* v. *Roberts, supra,* likewise considering this same scheme and an exact deed:

"By the deeds, the property in this case is held by F. M. Cockrill, J. L. Roberts and W. K. Morrow, as 'trustees of the Cumberland Presbyterian Church of the Warrensburg congregation' in one deed and in the others as 'trustees of the Cumberland Church in Warrensburg, Mo.' This attempted union being invalid, and the plaintiffs herein having dissented from the Cumberland faith and cast their lot with another church of a different faith and creed, they are not entitled to the beneficial use of this property, but the beneficial thereof belongs to defendants, and all other members of the congregation of the Cumberland Presbyterian Church of Warrensburg, Mo., who have remained faithful to

the doctrines of that church. The universal rule is that where there is a schism in a church, those remaining faithful to the tenets of the church at the time of the dispute, whether they be in the majority or the minority, are entitled to hold the property." (222 Mo., 690.)

The *civil law*, as contradistinguished from *ecclesiastical law, controls* the ownership of property in this country. These Cumberland Presbyterians have "simply stayed where they were." *They answer* the description of *the deed; their opponents do not*, for they confess *they have gone into another church.* How is it possible that Cumberland Presbyterians by remaining in the same organization become seceders and lose the property, and that the unionists by going into another organization become the sole beneficiaries and take the property?

The ownership and power of control over property conveyed to a local congregation in the Presbyterian Church, or to trustees for its use, is well illustrated by the case of *Westminster Presbyterian Church* v. *Trustees of Presbytery of New York*, decided by the Court of Appeals of New York and reported in 211 N. Y., p. 214, wherein it was held that such property belonging to the congregation, could not be taken from it by mere ecclesiastical action of the presbytery or church court, but only by legal action in the civil court.

The conclusion reached by the New York court in its very recent decision is in effect the same as that reached by the Supreme Court of Missouri in the case of *Boyles* v. *Roberts*, 222 Mo., 613, as to the ownership of local properties and the right of members thereof to have controversies as to rights of property determined by the civil courts.

XXII.

Civil courts consider doctrine to ascertain identity.

Civil Courts will inquire as to the doctrines, etc., in case of disvision in congregations, to ascertain true identity.

We understand it to be a universal rule that civil courts will inquire for themselves as to doctrine, polity, etc., where there is a division of membership and a controversy as to local property, and will give the property to those adhering to the faith, government, etc., held at the time the property was acquired. The quotation from the following cases, illustrates the principles contended for:

"It is not in the power of a majority of a religious society by reason of a change of religious views, to carry property which has been dedicated to a church to a new and different doctrine. And the title to church property of a divided congregation is in that part of it, whether a minority or a majority, which is acting in harmony with its own law; and the

ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began are the standards for determining which party is right."

Rodgers v. *Burnett*, 108 Tenn., 183.

Practically the same language as that used in the case above quoted from, is used in so many of the cases, that it is deemed unnecessary to make further quotations on the subject. Some of these cases are:

General Assembly of Free Church of Scotland v. *Overton*, Law Reports, Appeal Cases, 1904, p. 612;
Gartin v. *Penick*, 5 Bush, 110;
McGinnis v. *Watson*, 41 Pa., 13;
Schnorr's Appeal, 67 Pa., 138;
Mt. Zion's Baptist Church v. *Whitmore*, (Iowa) 13 L. R. A., 205, and citations.
Smith v. *Pedigo*, 145 Ind., 361, and citations;

Also:

Hendrickson v. *Shotwell*, 1 N. J. Eq., (Saxton) 577;
True Re'fd Dutch Church v. *Iserman*, 64 N. J. Law, 506;
Rose v. *Isaac Christ*, 193 Pa., 13;
See especially elaborate note, 4 Am., and Eng., Dec., 510-12.
Landrith v. *Hudgins, supra;*
Boyles v. *Roberts, supra.*

XXIII.

Separation of church and state.

The *religious liberty* guaranteed by the Federal Constitution (Am. Art. 1), and by State Constitutions, implies complete separation of Church and State, and contemplates *exclusive* jurisdiction on the part of each of them of matters peculiarly within its own proper domain. In the domain of the Church are *all religious rights;* and neither can, upon any pretext of for *rights*, in the domain of the States are all *civil* any purpose, lawfully invade the domain of the other. Ecclesiastical courts have "*exclusive*" jurisdiction of matters of *religion*, as such; and civil courts "*exclusive*" jurisdiction of *civil rights*. *Bridges* v. *Wilson*, 11 Heisk., 470; *Watson* v. *Garvin*, 54 Mo., 377; *Garvin* v. *Penick*, 5 Bush, 117; *Westminster Church* v. *Trustees*, 211 N. Y., 214.

In *Bridges* v. *Wilson supra*, the court observed:

"Ecclesiastical courts have exclusive jurisdiction in matters of Church government, Church organization, religious tenets, and the laws of the religious judications; with these the civil courts must not and cannot interfere, but must leave to the free, uncontrolled jurisdiction of the tribunal established by the Church. * * * The personal and property rights of Churches and their members are civil, and of them the Courts of this State have

exclusive jurisdiction. Ecclesiastical courts have no jurisdiction to decide the rights of property and enforce its protection." (11 Heisk., 470.)

Civil courts have no power to revise creeds of Churches; but to settle the title in cases of schism, the Constitution of the Church and the faith and doctrine of each class of conflicting claimants may be considered incidentally to identify the true beneficiaries.

XXIV.

Civil rights protected by State and Federal Constitutions.

No church judicatory may surrender the denomination it represents, its name and organization, doctrines and constitution, property and membership, or any of these, to another denomination; and, at the same time, by its own decision or declaration, preclude civil courts from inquiring whether or not such judicatory had the constitutional power to make such surrender.

To give such conclusiveness and force to the action of an ecclesiastical body would be to deny the civil courts any power in reference to civil rights affected thereby, except that of enforcing the edict of that body; and this would be to subordinate the civil courts to the arbitrary control of the Church court, and, in effect, to deny the former any right or power of their own in re-

gard to the property and property rights of religious associations and members thereof. "The guarantee of religious freedom has nothing to do with the property." *Schnorr's* Appeal, 67 Pa., 138.

It would give the Church Courts the power to accomplish such things as are prohibited by the law of the land, as in this case it is contended, to divert property raised from one trust to use upon another. To compel membership in and support of a Church organization by a citizen, involuntarily. The Church law by all the rules must be consistent with the law of the land. To allow a finding of the Church Court to the effect that its action in a certain matter had been constitutionally taken to have effect as having reference to the constitution and laws of the State, and thereby precluding the State, would render it impossible for the State Court to require and enforce the principle * * * that incorporate bodies can only have and accomplish such purposes as are not inconsistent with the law of the land. This rule is well stated in the case of *Prickett* v. *Wells*, 117 Mo., p. 513.

Where civil rights are involved, civil courts must always have the untrammelled right and power of deciding such rights for themselves, under and in accordance with the laws of the government which they represent; otherwise there would be *deprivation of property without due process of law, and hence a violation of the State and Federal constitutions.* The constitu-

tional prohibition against such deprivation protects the owner in the enjoyment of his property, and allows it to be taken from him only through some legal proceeding, conducted in some civil court or otherwise as prescribed by the civil law, State or Federal. The *due process of law, or law of the land,* by which the owner may lawfully be deprived of property or property rights, *gives* the owner a right to *a day in court* and the assurance of *a hearing* under the *State* or *Federal law.* This precludes the idea that the deprivation may be accomplished by any other means, or that the decision or edict of an ecclesiastical body may be substituted for the judgment of the civil court.

> "It is the general rule that what cannot be done directly from defect of power, cannot be done indirectly."
>
> *Wayman* v. *Southward,* 10 Wheaton, 50.

Obviously Church courts have *no power* to decide civil rights *directly,* therefore they cannot decide them *indirectly,* as would be the case if civil courts were bound to accept their decisions affecting civil rights as conclusive.

The right even to assume such power is plainly negatived by a precautionary statement made in the introduction to the Cumberland Presbyterian Confession of Faith and Government, adopted in 1883. It is:

> "Ecclesiastical discipline is altogether dis-

tinct from civil magistracy, and Church judicatories do not possess any civil jurisdiction —cannot inflict any civil penalties nor have any jurisdiction in political or civil affairs. Their power is wholly moral and ecclesiastical." (Page 8.)

Some authority already cited are in point here, namely:

Watson v. *Garvin*, 54 Mo., 367;
Gartin v. *Pennick*, 5 Bush., 123-4;
Ferravi v. *Vasconcellos*, 31 Ill., 25;
Bridges v. *Wilson*, 11 Heisk., 470:
"But no man or association of men can be deprived of property except by the law of the land."
54 Mo., 367.

These Cumberland Presbyterians have had no *day in court* until *now*, and they have none *now* if they shall be *deprived* of their house of worship, *directly* or *indirectly*, by reason of anything the majority in the General Assembly did or said in 1904, 1905 and 1906.

XXV.

Church union cases further analyzed.

Our research, aided by the citations of industrious and learned counsel for the opposition, has discovered only five Church union cases considered by civil courts prior to the present scheme.

All of them have been adverted to heretofore in this paper; nevertheless it is hoped that some further observations upon them will not be deemed superfluous.

In the first and last of these cases, decided, respectively, in the year 1837 and 1904, decrees were pronounced against the validity of the schemes there considered; while in the other three, decided in the decade from 1860 to 1870, the validity of the scheme there was sustained. Only three arrangements, or schemes, were involved in the five cases: one in the first, another in the next three, and the other in the last.

The plan in the first case contemplated a *merger* of the Associate Reformed Church into this same Presbyterian Church with its name, property and organization, and was by the Court *adjudged void.* (*Associate Reformed Church* v. *Trustees of Theological Seminary,* 4 N. J. Ch. R. (3 Green), 77.)

The plan considered in the next three cases, being the same in all of them, provided for the organic union of the Associate Church and the Associate Reformed Church, which were of the *same faith and order,* upon an *equal footing* and under another name, the United Presbyterian Church. Each of the three courts held the arrangement valid. *McGinnis* v. *Watson,* 41 Pa., 9; *McBride* v. *Porter,* 17 Iowa, 203; *Ramsey's Appeal,* 88 Pa., 60.

The plan before the House of Lords in the last case was intended to unite or consolidate the Free Church of Scotland and the United Presbyterian Church under a new name, the United Free Church. This arrangement was adjudged to be *void because of differences in doctrine*: first, in respect of the Establishment principle, and, secondly, in respect of the doctrine of predestination. *General Assembly of the Free Church of Scotland* v. *Overton*, Law Reports, Appeal Cases, 1904, p. 612.

So it is seen that the only *one* of the *three* plans sanctioned as *valid* by the civil courts was that in which the two Churches uniting were of the *same faith and order*, and in which a new name was adopted for the new organization into which each entered upon an *equal* footing.

Neither of those controlling elements enter into *the plan* now under consideration before this Honorable Court. The *faith and order* of the two Churches here involved are different, and the two *do not go* into the contemplated organization on *an equal footing*. Far from it. There is no new or changed organization here. *One* of the old Churches is perfectly, purposely and pronouncedly *preserved in everything*, name, doctrine and organization; while the *other* is *not preserved in anything*, but is completely merged into the former under its name, doctrine and organization.

The *present plan*, on the other hand, *combines*

all the controling features of both of the two *arrangements*, which were by the civil courts *adjudged* to be *void*, and is *subject*, therefore, to *double impeachment and condemnation*. It contemplates the *merger* of one Church into the other, and consequently *falls under the condemnation* of the New Jersey equity case. It attempts to bring into one organization *two churches of different doctrine*, and therein subjects itself to the *condemnation* of the Free Church of Scotland case.

Upon this analysis it becomes clear that the *three adjudications sustaining the same plan are not applicable here*, because that plan was different from this one in its controlling elements. Also that *each of the two adjudications annulling the other two plans*, one each, are entirely applicable in this instance for the reason that *this plan combines the controlling and illegal features of both of those.*

Such were and are the prior adjudications by civil courts, English and American, in respect of church union brought to their attention.

The Supreme Courts of Missouri (*Boyles* v. *Roberts*, 222 Mo., 613), and Tennessee (*Landrith* v. *Hudgins*, 121 Tenn., 556), as before seen, have held the present plan illegal, because it contemplates and requires the unauthorized *merger* of the Cumberland Presbyterian Church into the Presbyterian Church in the United States of America, and the unauthorized *absorp-*

tion of the former by the latter, because of *differences in the doctrines* of the two Churches, and also because *only a part* of the plan *was submitted* to the Presbyteries.

On the other hand, the courts of last resort in Georgia (*Mack* v. *Kime*, 129 Ga., 1), Kentucky (*Wallace* v. *Hughes*, 131 Ky., 445), California (*Permanent Committee, etc.* v. *Pacific Synod*, 157 Cal., 105), Texas (*Brown* v. *Clark*, 102 Tex., 323), Indiana (*Ramsey* v. *Hicks*, 174 Ind., 428), Illinois (*First Pres. Ch.* v. *First Cumb. Pres. Ch.*, 245 Ill., 74), Arkansas (*Sanders* v. *Baggerly*, 96 Ark., 1177), Alabama (*Harrison* v. *Cosby*, 173 Ala., 81), Mississippi (*Carothers* v. *Moseley*, 99 Miss., 671), and Oklahoma (*Pres. Ch.* v. *Cumb. Ch.* 340 Okla., 503), have held the present scheme valid.

But these courts treated the scheme as a mutual union, entirely overlooking or ignoring the dominant fact that it required the absolute destruction of the legal and ecclesiastical existence of the Cumberland Presbyterian Church and the complete preservation of the other Church. They also overlooked and ignored the fact that the first section of the plan, which required the surrender of the *name* and *organization* and *property* of the Cumberland Presbyterian Church, was not submitted to the Presbyteries, except the California and Arkansas courts said the surrender of the *name* was in effect included in the second section which was submitted. Moreover, these courts, all of them, mistakenly

assumed that the General Assembly had decided the doctrines of the two Churches were the same, and upon that assumption they held that supposed decision and the legislative declaration, that the plan had been "constitutionally adopted," to be *conclusive* on the members and on the civil courts.

Moreover, these courts, or a large number of them, proceeded upon the assumption that the law of the Presbyterian Church and other Presbyterian Church bodies, were the same as the Cumberland, and laid much stress on the proposition that as the Presbyterian Church and other Presbyterian bodies had made a number of unions, the Cumberland Church, having the same laws, must also be authorized to make a merger. But the record shows such assumption not well founded.

The above and foregoing part of this brief is applicable to both cases.

XXVI.

In each case there were certain persons who were indispensable parties to the litigation; made parties. In their absence the court ought not to proceed to a decree.

(a) *The College case.*

The suit is brought by The Synod of Kansas of the Presbyterian Church in the United States of America, H. G. Mathis, R. Thompson, Wil-

liam Foulkes, J. B. Larimer, Samuel Garvin and Charles M. Tabler. The Synod of Kansas is a corporation of the State of Kansas. The other complainants are said to be officers and members and represent the Synod of Kansas of the Presbyterian Church, which is composed of several hundred members, citizens and residents of Kansas. (Record, p. 27.) The defendants, Duvan, Garst, Grimes, Harrison, Dameron, Everts, Freeman, Newman and Hinton are sued because they claim to be Trustees of the Missouri Valley College by virtue of their election or appointment as such by the Missouri Synod of the Cumberland Church (Rec., p. 30). The title to the college property is in the corporation defendant, Missouri Valley College (Rec., pp. 30-1).

The scheme for the establishment of a denomination college of the Cumberland Church was originated in 1874. It provided for the raising of a fund for the permanent endowment of such an institution of learning (Rec., pp. 144-7); the fund for this purpose was to come into the hands of the "Educational Commission." The Educational Commission itself was to be incorporated (Rec., p. 142); it actually was incorporated (Rec., pp. 153-163).

The scheme provided for the election by the Synods of a "Board of Trustees for said contemplated institution of learning" (Rec., p. 147); said Board was to have "the control and management of the ground, buildings, moneys, funds and effects of all kind of said institution,

and the appointment and removal of the professors, teachers and other employes of said institution, and the general management and control of said institution and its finances and operations" (Rec., p. 147). The scheme also provided that after the fund had been raised, the Commission should "proceed to obtain a suitable charter for the institution of learing," and that when it had been obtained, the Commission should turn over to the Trustees of the incorporated institution all the funds and assets, lands and property of every kind which they had secured for the purpose. (Rec., p. 151.) The Synods were to elect the Board of Trustees of the corporation (Rec., p. 151).

The Missouri Valley College was, in pursuance of this plan, duly incorporated (Rec., pp. 164-8). The charter of the college provided for a Board of Trustees to be elected by the Synods for a term of six years (Rec., p. 164). It was also provided that the Board of Trustees should have the "general management and control of the business of said college." This board was to employ the members of the faculty and fix their salaries; prescribe rules and regulations; employ workmen, agents, mechanics and employes; fix the tuition fees and other charges to students; confer academic degrees, and have the management and control of all the funds of the institution. (Rec., p. 166.)

It is, then, entirely clear that the possessions, management and control of the property was to

be in the persons designated by the Synods as Trustees. At the time of the alleged merger and union in 1906, the persons who constituted the Board of Trustees of the college, and who, up to that time had been, as such, in possession of the property, controlling and managing the same, assented to and approved the merger and since that time they and their successors, elected by Presbyterian Synods, have been and still are in possession of the property managing and directing the same.

That this was the situation, appears elsewhere in the record. Before this action was brought, the defendants Duvall and others, who claimed to be Trustees of the college, elected and appointed as such since the alleged merger and union by the Cumberland Synod, brought in the Circuit Court of Saline County, Missouri, against Pearson and others, who, as Trustees acknowledging the validity of the merger, were in possession of the property of the college. The petition in that case charged that the defendants denied allegiance to the Cumberland Church, declared their allegiance to the Presbyterian Church and wrongfully and illegally diverted all of the property of the college, both and real and personal, and that they had ever since held and used all of the property wrongfully and illegally and excluded the plaintiffs therefrom. (Rec., p. 500.) A part of the relief sought by that action was a decree that the complainants therein, as the legal Board of Trustees of the college, were entitled to the possession, dominion and

control of all its assets and affairs. (Rec., p. 506.) The object of the suit, then, was to obtain the possession, control and management of the property and affairs of the college. The defendants in that action, being the Presbyterian Trustees in possession, in their answer admitted that they were Trustees (Rec., p. 507), and that "they had been and now are in possession and control of its corporate property, rights and franchises and were and still are managing and directing the same as such Board of Trustees" (Rec., p. 509); that "they now are in full charge and control of all the properties in question" (Rec., p. 509).

The bill of complaint is this action avers that the defendants Duvall and others appointed as Trustees of the college by the Synod of the Cumberland Church, were authorized by the Synod "to take any and all steps necessary in their attempt to take, obtain charge, control and possession of all the property." (Rec., p. 30.) It avers that the individual defendants, so claiming to be Trustees, had been by the Cumberland Synod "instructed to demand of the Missouri Valley College and its officers and trustees, the immediate possession and control of all the real and personal property held by the said Missouri Valley College, and if said demand was not complied with to institute legal proceedings therefor;" and that "pursuant to said alleged direction, they have demanded of said college and its Trustees, the possession of all said property." (Rec., p. 31.) The relief sought by the bill of com-

plaint in this case is that the defendants, except the college, "be adjudged to have no right or title in or to said real estate in law or equity, and no right or title, legal or equitable, to said trust fund, and no right to the control or possession thereof;" and that the defendants be enjoined from "in any way interfering with, or attempting to interfere with, manage or control said property, real or personal, or the management or control of said Missouri Valley College as a corporation." (Rec., p. 33.)

The plea of the defendants averred that these persons in possession of the property as Trustees were indispensable parties to the litigation. The averments of the plea were afterwards, by leave of court, incorporated in paragraph 15 of the answer. (Rec., pp. 539, 542.)

The corporation known as the Missouri Valley College was made a defendant in this action, was served, but never appeared.

It is obvious in this action the title to the property of the college is not involved. The title is vested in the Missouri Valley College, a Missouri corporation. No one disputes that. The right to the possession, management and control of that property *is involved*, and the suit is *not one to quiet title, but is really one to quiet the right to such possession, management and control in certain persons not named in the bill*, who now enjoy such possession, management and control as Trustees, as against certain of the

defendants who also claim to be the only genuine Trustees and who deny the right of the others and claim for themselves the right of such possession, management and control of the property. Those persons so in possession are of the Presbyterian persuasion, while the defendants who assert that they themselves ought to have possession as Trustees, adhere to the Cumberland faith. That the persons, Pearson, and others, who are claimed to be indispensable parties, sustain the relations to the property alleged in the answer, is a conceded fact. (Stipulation, Rec., pp. 456-7.) As has been said, the Cumberland Trustees claim the possession, management and control and it is because of that claim that they have been made defendants in this action, whose object it is to obtain a decree extinguishing the claim. The real contest, then, in this controversy, is between two boards or bodies of men, each claiming the right to the possession, control and management of the property, one of the bodies being in possession and the other being out of possession, but claiming the right to it. Those out of possession are, as has been stated, made defendants, and the plea which was filed and overruled was, in substance, renewed by leave of court in the answer of the defendants.

The answer pleaded the facts briefly referred to under this point and averred that Pearson and certain other persons mentioned (being the Presbyterian Trustees of the property of the college and managing and controlling the same)

were necessary and indispensable parties to the bill and that the court should not proceed to a determination of the controversy unless they were made parties, and that *all of them were citizens and residents of the State of Missouri* and some of them inhabitants of and residing in the Western Division of the Western Judicial District thereof. (Rec., pp. 539-42.) That contention the appellants are most earnest in presenting to this court. If the purpose of a suit by one out of possession is to obtain possession of property, the person in possession is an indispensable party. If the person in possession, management and control of a property wishes to quiet his right to that possession, management and control, as against other persons claiming the right to such possession, management and control, it would seem that the person so in possession is an indispensable party to an action brought for that purpose. No one can bring such an action for him. The antagonists must be brought face to face. All persons interested in the controversy and whose interests will be affected by any decree ought to be made parties, or the court should refuse to proceed. This is necessary for more reasons than one: That every interest may be heard; that full and complete justice may be done and the entire controversy settled; and that those whose interests are involved should be in court in order that they may be bound by the decree, so that there may be an end of litigation. The complainants bring the Cumberland Trustees into court as indispensable parties to the litigation; the chief com-

plaint set forth in their bill of complaint was that these persons, professing to be Trustees, were, as such, demanding possession of the property and threatening to bring suit for such possession. They were the ones against whom the bill and all its substantial averments were aimed. Their offense was, according to the bill, that they disputed the right of the Presbyterian Trustees to the possession, management and control of the property; the right, therefore, of the persons who were such Presbyterian Trustees to the possession, management and control of the property was the thing in issue; *that is the meat of the whole controversy.* This being true, it seems unprecedented that the very persons whose rights have been denied, whose possession is threatened by the defendants, should be absent from a litigation *instituted to protect those rights.* The nature of the final decree to be rendered could not. and cannot now be assumed. The decree might have been in favor of the defendants (Cumberland Trustees) insofar as such a decree could have established their right to the possession, management and control of the property. If that had been the result, the Trustees in possession (the Presbyterian Trustees) would not have been bound by the litigation, because they were not parties to it. There was no difficulty in bringing them before the court; they are all residents of Missouri, and in such a case as this, where the decree might have been in favor of the right claimed by the defendants (Cumberland Trustees), a right

which could not co-exist with a similar right in the Presbyterian Trustees, the interest of the Presbyterian Trustees is so inevitably and necessarily involved in a decree for the Cumberland Trustees that the court ought not to proceed in their absence.

How can the court decide which of the two contending classes of persons, Pearson, and his associates on one side, or Duvall and his associates on the other side, constitutes the legal Board of Trustees of Missouri Valley College, unless those of each class are before the court? How can the court decide the controversy in favor of one and against the other and continue or change the possession, control and management of the corporate property and affairs unless both are parties to the suit?

It is believed and submitted by the appellants that no decree could be made for Pearson and his associates, or against them in their absence from the record as parties. They were entitled to their day in court, and cannot be found without it; and those whom they oppose, Duvall and his associates, are entitled to have them in court and cannot be bound otherwise. A decree in favor of Duvall and his associates, adjudging that they had the right to the possession, management and control of the property, would in the absence of Pearson and his associates, have been entirely nugatory. Duvall and his associates could not have been placed in possession or Pearson and his associ-

ates ejected from the possession by virtue of any process issued upon such a decree. Pearson and his associates could not be ousted as Trustees and deprived of their possession, control and management of the property and affairs of the Missouri Valley College in a case to which they were not made parties, and for the same reason they could not be adjudged to be the lawful Trustees and as such continued and protected in that possession, control and management in a case to which they were not parties. If they could not in their absence from the record be adjudged to be go out, they could not in their absence from the record be adjudged to stay in. Their claim could not be adjudged one way or the other as the record now stands; and, of course, if their claim could not be adjudged, the opposing claim of the defendants Duvall and his associates could not be adjudged. Binding decrees as to controverted rights can never be made unless the parties materially affected thereby on the respective sides of the controversy are before the court. Would not a decree as to the legal trusteeship of Missouri Valley College and as to the possession, control and management of its property and affairs affect the rights of Pearson and his associates who are absent from the record in this cause? Undoubtedly. And moreover, how could the opposing claims as to those matters by Duvall and his associaties, who are before the court, be adjudged "and complete and final justice" be done to them without affecting the rights of Pearson and his associates? Not at all. Is not the "interest" of

Pearson and his associates in the present controversy "of such a nature that a final decree could not be made without affecting their interest," and was it not "wholly inconsistent with equity and good conscience" to proceed with the case and finally determine the controversy between them and their opponents, Duvall and his associates, when only the latter were parties and could not enforce a decree in their favor against Pearson and his associates because they were not before the court? It is confidently submitted that the "interests" of Pearson and his associates "in the subject-matter of the suit and relief sought were so bound up with those of the other parties" (Duvall and his associates who opposed them) "that their legal presence as parties was an absolute necessity without which the court could not proceed." The decree, undoubtedly, affected directly the rights and interests of Pearson and his associates; it adjudged and established their claim and their allegations of the bill that they were the only legal Board of Trustees of Missouri Valley College, and defeated and nullified the opposing claim of Duvall and his associates to the same trusteeship; by injunction it continued and protected Pearson and his associates in present possession of the property of the college and in the control and management of its affairs, repelling and restraining Duvall and his associates from interference therewith.

To a bill seeking such relief, Pearson and his associates, under all the cases, are *indispensable parties* and the suit ought not to have proceeded

without them. Duvall and his associates ought not to have been compelled to go on in a litigation in which a decree in their favor would have been fruitless, non-enforceable and void, because those against whom it should be pronounced had not had their day in court. It is not a just nor an allowable answer to say that Duvall and his associates could, in that event, bring another suit and litigate the matter with Pearson and his associates. If the claim of Duvall and his associates were to be adjudged, they were entitled to have their opponents in court. Were they to have no chance of success in the litigation and, yet, let it go on? Must they have been bound by the decree if the decree should be against them, and if for them to be told that it was of no value because their opponents were not parties? Must they risk losing without a possibility of gaining, and that in a court of equity and good conscience? What the final determination of the suit would be if it went on, whether favorable or unfavorable to Pearson and his associates, could not be foreseen; and whether it would be one way or the other was wholly unimportant in deciding whether Pearson and his associates were indispensable parties. In one event, they would stay in the trusteeship and property and in the other event they would go out if the decree of the court should be valid. They were indispensable parties; and in neither event, consequently, would the decree be binding when they were not before the court.

The *complainants* are not indispensable parties

to a proper suit for the settlement of this controversy; but Pearson and his associates are, as shown. In proper suit between Pearson and his associates on one side and the present defendants on the other side, a court of competent jurisdiction could decide the controversy and render and enforce a final decree, doing full and complete justice to all concerned, without having the complainants before the court; but, for the reasons already stated, no such decree can be rendered, or enforced if rendered, in the present case, or in any other case in the absence of Pearson and his associates as parties to the suit.

Those in possession must always be in court as parties when the right of possession is to be adjudged, and the possession continued or changed. Without them the case is one-sided, and the court's decision must be fruitless, leaving all concerned just where they were before the suit was commenced, without any effective change of right or relation. The "ins" are still in, and the "outs" are still out; and the court is powerless to change the situation or to render a binding decree one way or the other, because the "ins" are not parties to the suit and as such subject to the orders of the court.

The "ins" must stand for themselves in every litigation involving the possession of this property. No one can stand for them or represent them in such sense as to dispense with the necessity of their presence as actual parties to the suit.

A suggestion of separable interests in this case on the part of Pearson and his associates, if made, could not be sustained; because it is manifest, as before seen, that an adjudication of their interests is essential to a decision of the real controversy presented in the bill. If their claim to the trusteeship of the property, and the question of the legality of their possession, use and control of it be elimated from the suit, there will be nothing left for the court to pass upon. Only a moot court question would be left, and hardly that. No civil right would then be found in the case; and the mere question of the validity or invalidity of the alleged union would of itself afford the court no ground for jurisdiction. That question cannot be considered by a civil court apart from some civil right dependent upon it.

Although a plea for want of indispensable parties may be overruled at that stage of a litigation and the court decline to decide that it is without jurisdiction yet, at the hearing upon the merits, if it appears that there are persons who are indispensable parties to the suit who are not brought in, no decree will be rendered. This is true as a matter of general chancery practice. It does not go to the jurisdiction of a federal court as such. If by bringing in parties regarded by the court as indispensable, jurisdiction of the suit by a federal court is thereby ousted, that is merely an incident of that particular case. The same rule as to indispensable parties applies in both Federal and State courts.

This proposition is supported by the highest authority. Indispensable parties are:

> Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.
>
> A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former conditions, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are *completely separable from the rights of those absent, otherwise the latter are indispensable parties.*

* * *

It remains true, notwithstanding the Act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot

be done between the parties to the suit without affecting those rights.

* * *

But if the case cannot be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the Act of Congress and of the 47th rule of this courts, because they seem to have been misunderstood, and misapplied in this case; it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed."

Shields v. *Barrow*, 17 How., 130, 139-42.

Kendig, a citizen of Tennessee, brought suit in a Federal Court in Tennessee against Dean, a citizen of Ohio. It was over some shares of stock of the Memphis Gas Company, a Tennessee corporation; the company was not a party to the suit. The bill claimed that the complainant was the owner of the shares and that during the Civil War the defendant obtained possession of the books and fraudulently obtained a transfer to be made from the name of the complainant to his own name, and a certificate to be issued to him for the shares.

The bill asked that the capital stock be restored to the complainant, be deemed to be his prop-

erty, that the right thereto be divested out of Dean and vested in the complainant, and that Dean be compelled to authorize the transfer of the stock to be made on the books, to the complainant, and that he be enjoined from authorizing a transfer to any other person.

The court held that the company was an indispensable party to the bill. It said:

> "The court would find itself in the position of having made a decree it could not enforce, or attempting to give a relief which was beyond its power, because the party whose action was necessary to that relief was not a party to the suit."

Kendig v. Dean, 97 U. S., 423, 425.

Barney v. *Baltimore City,* was an action in equity for the partition of certain real estate and for an accounting. The complainant dismissed as to three of the defendants, who were tenants in common with her. Their presence ousted the jurisdiction of the court. Justice Miller said they were indispensable parties. He said:

> "The learning on the subject of parties to suits in chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that

while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will rejuire them to be made parties if within its jurisdiction, before deciding the case, but if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit and the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."

He further said:

"If a decree is made which is intended to bind them (the Ridgleys), it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties."

And again:

"This rule does not conflict with that under

which the courts of chancery act in refusing to make a decree, where, by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interest of the absent parties."

> *Barney* v. *Baltimore*, 6 Wall., 280, 284-285, 287.

Mallow v. *Hinde*, 12 Wheat., 194, was a case from Ohio. The circuit court had dismissed the bill. It was a contest over land. The plaintiff's claim was by virtue of a survey No. 537 in the name of one John Campbell. Campbell died, leaving a will devising to Taylor *et al*, his executors, all his property in trust for the children of his sister, Mrs. Beard. Taylor alone qualified. Taylor did not assign the warrants, entries or surveys to Mrs. Beard's children, but permitted them to take the management of them. One Langham made some executory contracts with Mrs. Beard's children after they arrived at full age, by which the bill alleges Langham became equitably entitled to survey No. 537. He afterward deeded the land to the complainants, who took possession of the land and improved it.

Hinde purchased from Col. Taylor a military warrant, which belonged to Taylor in his own right, and made an entry on it in Hinde's name, and caused a survey to be made upon it covering survey No. 537, and obtained a patent from the govern-

ment. Hinde then brought ejectment suits against the complainants and obtained judgments. The complainants then filed their bill for an injunction against the judgment at law, and praying Hinde should be decreed to release and convey to them his legal title. The bill charges that Taylor, with knowledge of Langham's contracts with the children, and that the complainants were equitably entitled to the possession of survey No. 537, combined with Hinde and others and withdrew the Campbell entry so that Hinde could survey and obtain the land in his own name; the bill also averred that Taylor and the Beards refused to perfect the survey by obtaining a patent and refusing to convey it to the plaintiffs.

Neither Taylor, the trustee, nor the Beard children were made defendants, they being out of the jurisdiction of the court. The circuit court dismissed the bill. It was contended that the proper parties were not before the court so as to enable the court to decree upon the merits of the conflicting claims. The supreme court said, "We are all of that opinion." The court said that the claim of the complainants rested on executory agreements, the validity and obligation of which the parties to them had a right to contest.

> "We cannot try their validity, and decide upon their efficacy, by affirming they confer upon the appellants an equitable right, without manifest prejudice to the rights of those not before the court."

The court said that the complainants could have no claim unless the contracts were such as ought to be decreed against the Beards specifically by a court of equity. "How can a court of equity decide that these contracts ought to be sepcifically decreed, without hearing the parties to them? Such a proceeding would be contrary to all the rules which govern courts of equity and against the principles of natural justice."

The court said that in *Elemendorf* v. *Taylor*, 10 Wheat., 167, it was observed:

> "But if the case may be *completely* decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as, if such party be the resident of some other state, ought not to prevent a decree upon its merits."

The court then went on to remark upon this case as follows:

> "This doctrine was applied to the case where a small interest was outstanding in one not before the court, as tenant in common. In that case, the right of the party before the court did not depend upon the right of the party not before the court; each of their rights stood upon its own independent basis; and the ground upon which it was necessary, according to the general principle, to have both before the court, was to avoid multiplicity of

suits, and to have the whole matter settled at once. In this case the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant, without directly affecting and prejudicing the rights of others, not made parties.

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

Mallow v. *Hinde*, 12 Wheat., 194, 197-8.

By an original proceeding in the Supreme Court, the State of California brought an action leaving a will devising to Taylor *et all*, his exe- in equity against the Southern Pacific Company. It involved the title to certain lands about the Bay of San Francisco. The bill averred that the defendant company claimed to be the owner of the title adverse to the State of California and had taken possession of certain parts of it and was claiming and asserting exclusive control over all of the lands decribed in the bill, and denied the right of the State to exercise any control over the lands. The relief sought was that

the nature of the claim of the defendant to the premises be determined by a decree of the court, and that the complainant might be adjudged to be the owner of the whole of the premises and that the defendant had no interest therin and no right thereof, and that the cloud cast by the defendant's claim on the title of the State might be removed; and that the State might be declared to have the sole and exclusive right to the property in controversy .

Pending the proceedings, the City of Oakland applied to be made a complainant, the city asserting that it had some rights in the matter. That application was denied. But leave was granted to the city to file briefs, maps and documents illustrative of its alleged title.

Upon final hearing the bill was dismissed, the court declining to proceed in the absence, as parties, of the City of Oakland and the Oakland Water Front Company. The court said:

> "We are constrained to conclude that the City of Oakland and the Oakland Water Front Company are so situated in respect to this litigation that we ought not to proceed in their absence.
>
> When, heretofore, the City of Oakland applied to be made a co-complainant herein, the question of parties was necessarily suggested, although that application was such, and presented at such a stage of the case, that the court was neither called on to, nor could prop-

erly, deal with the general subject. As original jurisdiction only subsisted in that the State was party, and the moving party (Eleventh Amendment, *Hans* v. *Louisiana*, 134 U. S., 1), the motion of the City was denied. But we at the same time granted leave to the City to file briefs, accompained by such maps and documents illustrative of its alleged title as it might be advised. The matter was thus left to the consideration of counsel as to whether indispensable or necessary parties had not been joined, while if the case was permitted to go to a hearing the court would then be able to dispose of it understandingly. We may add, that even if reference could be made to the 47th rule in equity by way of analogy, that rule does not apply when indispensable parties are lacking, and that in respect of necessary parties the cause may or may not be proceeded in without them, as the court may determine in the exercise of sound discretion. We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, *even though they might not be technically bound in subsequent litigation in some other tribunal.*"

California v. *Southern Pacific Co.*, 157 U. S., 229, 256.

"We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl., 72., Sec. 72: 'It is a general rule in equity (subject to certain exceptions which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.' See also 1 Daniell's Chan. Pl. and Prac., 246, *et seq.*

In the case before us, we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that *a court cannot adjudicate directly upon a person's right without having him either actually or constructive-*

ly before it. This principle is fundamental. The allegations of the bill show that the contract sued on was made and entered into subsequently to the termination of the proceedings before the referee. By the terms of that contract the note in dispute between Mrs. Pike and the complainant was to be held by the bailee, Stetson, 'subject to the joint order and direction' of their respective attorneys. It seems too plain to require argument that complainant Gregory, Mrs. Pike, Talbot, Brooks, and Stetson, all had an interest in the subject-matter of the contract—such an interest, too, as brings the case within the rule just announced.

The point was made in the court below, and it is also pressed here, that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that is was, therefore, unnecessary to attempt to do so. The court below ruled against the complaintant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, *notwithstanding the statute referred to and the 47th equity rule a circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby.*"

Gregory v. *Stetson*, 133 U. S., 579, 586.

"The rule in equity as to parties defendant

is that *all whose interests will be affected by the decree sought to be obtained must be before the court;* and if any such persons cannot be reached by process—do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties—the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable. The act of Congress of 1839 and the rule of this court upon the subject give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with. The subject was fully considered in *Shields* v. *Barrow* (17 How., 130). What is there said need not be repeated."

Ribon v. *Railroad Companies*, 16 Wall., 446, 450.

"Complainant asserts that this court has jurisdiction because of the diverse citizenship of the parties. To this claim of jurisdiction, defendants reply that, while it is true the citizenship of the present parties to the bill is diverse, yet the bill discloses the lack of necessary parties, the San Diego Water Company and the San Diego Flume Company, whose introduction by amendment would destroy the existing conditions of diverse citizenship, and

therefore it plainly appears now that the court is without jurisdiction. Is this position tenable? For convenience and brevity, my discussion of this point will be confined in terms largely to the water company, although, since the interest of the flume company in the controversy is of the same general nature as that of the water company, the conclusions reached by me will apply to both companies.

It is unquestionably true that diverse citizenship, to sustain federal jurisdiction, must be such that all the parties on one side of the controversy are citizens of different states from all those on the other side, and that it is the duty of the court, in determining the question of jurisdiction, to arrange the parties on the one side or the other, according as their interests require, regardless of the position they occupy in the pleadings as plaintiffs or defendants. (Citing cases.) It is also unquestionably true, as shown by the bill, *that the interests of the San Diego Water Company are such that*, if said company were a party to the suit, the court in order to determine the question of jurisdiction, *would align said company with complainant*, and in that event the controversy would not be wholly between citizens of different states.

The only remaining question, then, in this connection, is whether or not the San Diego Water Company is a necessary party. On this subject the rule, I think, may be stated thus: *Where a person is so related to the subject-matter of a suit in equity as that the*

rights of such person must unavoidly be passed upon by the court in reaching a final decree, such person is a necessary party. The object of the rule, as declared by the authorities, is to avoid other suits by settling in the one which is pending the whole controversy.

* * *

I am satisfied that the San Diego Water Company and the San Diego Flume Company are necessary parties to the litigation and, further, that if they were made parties to this suit the controversy would not be wholly between citizens of different states. Where these two facts exist, as has been repeatedly held by the Supreme Court of the United States, the suit cannot be entertained."

Consolidated Water Co. v. *Babcock*, 76 Fed., 243, 247-8, 252.

After delivering this opinion, the circuit court entered a decree dismissing the bill. Appeal was taken from the decree, which was affirmed by the United States Circuit Court of Appeals for the 9th Circuit, that court saying:

"Upon the facts alleged in the bill, is the San Diego Water Company an indispensable party to the suit?

* * *

From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree

that might finally be rendered therein would affect its interest. *It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf,* if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. *Its presence is necessary to a full and complete determination of the questions in controversy in this suit.*

* * *

The general rule as to parties, as expressed in many of the authorities, is to the effect that all persons should be made parties to a suit in equity *who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree.* And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights of the San Diego Water Company, it is essentially necessary that it should be made a party to the suit, either as a plaintiff or a defendant.

* * *

We are of opinion that upon the facts, and under the principles announced in the authorities we have cited, the San Diego Water Company is not only a necessary, but an indispensable party to the suit. The court did not err in sustaining the demurrer. The judgment of the circuit court is affirmed."

Consolidated Water Co. v. *San Diego*, 93 Fed., 849, 850-3.

"It is urged in support of the demurrer to the bill, that this court is without jurisdiction, for the reason that it appears from the bill that the title to the property involved is in the San Diego Water Company, a corporation of the State of California, whose rights therein are necessarily affected by the ordinance sought to be annulled by the bill, and that that company is therefore an indispensable party to the suit, and, if made a party, whether as complainant or defendant, must for jurisdictional purposes be aligned with the complainant, which alignment would, by reason of the citizenship of that company, show a want of jurisdiction in this court. That would undoubtedly be so if the jurisdiction of this court depended upon the diverse citizenship of the parties. It was so held by Judge Wellborn in the case of *Water Co.* v. *Babcock*, 76 Fed., 243, and subsequently by me in the same case in an opinion filed August 16, 1897. In his argument upon the present demurrer, the counsel for the complainant insists that those rulings are contrary to the decision in the case of *Mercantile Trust Co.* v. *Texas & P. Ry. Co.*, 51 Fed., 529, and in the case of *Reagan* v. *Trust Co.*, 154 U. S., 362, 14 Sup. Ct., 1047. What this court held in the Babcock case when under consideration by the district judge, as well as by myself, was that where the jurisdiction depends upon the diverse citizenship of

the parties, and the bill shows, as it did in that case, that the complainant's cause of action depends wholly upon the facts that the property rights of the mortgagor are invaded, with those rights the complainant's interests (as mortgagee) are so inseparably connected that there can be no adjudication thereon without passing upon the rights of the mortgagor, the mortgagor is an indispensable party, and, when made a party, must be aligned with the complainant; and that when, as in that case, the diverse citizenship of the parties is thus destroyed, the court is without jurisdiction. In neither of the cases cited by counsel for the complainant in the present as well as in the Babcock case, was there anything decided to the contrary of this."

Consolidated Water Co. v. *San Diego*, 84 Fed., 369-370.

"The Producers' Oil Company is the owner of an undivided one-half interest in 100 acres of the 144 acres of land involved in the suit. It is in possession, drilling the land and extracting oil. Its claim to it is derived from Hooks, who claimed the same by a lease which the bill seeks to cancel. The bill seeks to establish the validity of and to enforce a lease to Staiti, which, if established as existing and valid, makes the lease to Hooks ineffective. Such being the relief sought by the bill, can the court proceed to a decree as between the Vincent Oil Company and the Gulf Refining

Company and the other defendants, and do complete and final justice, without affecting the rights of the Producers' Oil Company? *It is not an answer but a mere avoidance of this question, to say that the decree will not be binding on the Producers' Oil Company, it not being a party. This is true as to the omitted party in all cases involving the question discussed here.* The decree sought would interfere with the possession of the Producers' Oil Company, which now exclusive of the complainant, and would place the complainant in joint possession. It would set up the Staiti lease and cancel the Hooks lease, which is the source of the title held by the Producers' Oil Company. It is true that the decree would not be binding on the Producers' Oil Company, but surely that company should be before the court to be heard in a case affecting its possession and the source of its title.

It has always been the constant aim and purpose of an equity court to do complete justice by deciding and settling the rights of all persons interested in the subject of the suit so as to make it safe to the parties to obey the orders of the court and to prevent future litigation. To attempt to settle the disputes described in the bill without the presence of the Producers' Oil Company would not only affect its rights and possession, but *would leave the controversy itself in an unsettled condition—a condition tending to cause further litigation.* The lease to Hooks might be cancelled, but Hooks' sublease to the Pro-

ducers' Oil Company would remain valid; that is, technically it would not be avoided by the decree. The Producers' Oil Company would be left in possession with the right to extract oil, but its co-tenant, the Gulf Refining Company, having a like interest derived from the same source, would be ousted and the complainant substituted in right and possession. An accounting would be necessary between the Producers' Oil Company and the Gulf Refining Company, though the title of the latter would be annulled and that of the former would remain technically intact. So far as the Producters' Oil Company was damaged by the cancellation of the Hooks' lease and the interference with its operations, it would have a right of action against Hooks; and Hooks, who is not a party to the bill, would have a right of action against his lessors, Vincent and associates. It seems to us clear that no decree doing complete justice between the parties could be rendered which would leave the Hooks lease valid and in force as to the Producers' Oil Company, and void as to others claiming under the same lease.

The principles announced in decisions which are controlling here fully sustain the view that the Producers' Oil Company is an indispensable party to this suit."

Vincent Oil Co. v. *Gulf Refining Co.*, 195 Fed., 434, 436.

"The aim of a court of equity is to do com-

plete justice by deciding upon and settling the rights of all persons directly interested in the subject of the suit, so as to make the performance of the order of the court safe to those who are required to obey it, and to prevent future litigation. To accomplish this end, all persons materially interested in the subject ought generally to be parties to the suit. there is a class of persons who are not only termed necessary parties, but who are indispensable parties, to-wit, persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. (Citing cases.) We think that the application of this rule shows that the Summit Lumber Company is a necessary party to this suit.

* * *

The Summit Lumber Company and the complainant both being corporations created under the laws of the same state and for the purposes of jurisdiction, citizens of the same state, the jurisdiction of the circuit court will be defeated when it is made a party; and yet its interest in the case is such that the relief called for by the bill cannot be granted without having it before the court as a party."

Arkansas Southeastern R. Co. v. *Union Saw Mill Co.*, 154 Fed., 304, 311.

Eldred v. *American Palace Car Company* was an action by a stockholder of a Maine corporation to set aside a transfer made by that company of certain property to a New Jersey corporation, and to enjoin the latter from disposing of the property. The Maine corporation was not a party to the suit. The court said:

"The Maine company, by a practically unanimous vote of its stockholders, favors the plan, and that company refuses to become a party to this bill, by which it is sought to invalidate the transfer. Apart from the strong case thereby presented for the court declining to lend its aid to the minority stockholders, whose purpose is manifestly not to put the company in a position where its indebtedness can be paid or provided for, but to obstruct the plan of practically all the stockholders whereby something can be saved from the wreck, we think this injunction should be lifted, because it is clear the complainant can have no relief by final decree. This litigation must eventually end in the dismissal of the bill, by reason of the absence from the record of a necessary party. If such be the certain end of the bill, why should this injunction, without security, stand until that end is reached? It is quite clear that the right of action here sought to be enforced is the right of action of the Maine corporation. The right of such corporation is the fundation on which the relief sought by its stockholders rests. The stockholder has no rights separable from those

of the corporation. The right of the party before the court depends on the right of the party not before the court. Not only is the presence on the record of that corporation necessary to constitute the stockholders' right, *but the respondent has a right to its presence so that it may be concluded by the decree.* The authorities are clear that such corporation, either as a complainant or a respondent, is an indispensable party to the bill."

Eldred v. *Am. Palace Car Co.*, 105 Fed., 457, 458.

"The remaining contention of appellant, necessary to be considered, is that the circuit court erred in holding that the securities company was an indispensable party to the suit, and that in its absence the intervening petition could not be maintained. The theory of the appellant is that, as an individual stockholder, he can maintain a suit against his corporation as sole defendant to prevent it from commencing or continuing the doing of those things which are beyond its corporate powers, are in violation of law, and which may lead to a forfeiture of its corporate franchises; that, in respect of the charges made in his intervening petition and the relief sought thereby, the defendant company may stand as the sole representative in the suit of all of the stockholders, including the securities company, and that, therefore, the presence of the latter may be dispensed with. But appellant ignores the

force of the pressing and insistent fact that the very thing of which he complains is primarily the ownership by the securities company of a majority of the stock of the defendant, and the end which he is seeking is the destruction of its title and its status as a stockholder. It is of the foundation of our jurisprudence that the rights of a person shall not be directly affected by a judicial proceeding to which he is not a party, and in which he cannot be heard for their defense and protection. Out of this principle has grown the rule, always recognized and enforced, that a suit *will not be entertained in the absence of a person who has an interest in the controversy of such a nature that a final decree cannot be rendered without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.*

* * *

We are of the opinion that the securities company was an indispensable party to the controversy, and that the circuit court correctly held that the suit could not be maintained in its absence."

Weidenfeld v. *Northern Pac. Ry. Co.*, 129 Fed., 305, 310.

"In the leading case of *Shields* v. *Barrow*, 17 How. (U. S.), 130, 141, 15 L. Ed., 158, the Supreme Court, after expounding the meaning of the forty-seventh rule in equity,

and the provisions of the Act of February 28, 1839 (5 Stat., 321), which makes provision, when some defendant may not be an inhabitant of or found within a district or may not voluntarily appear to an action, for entertaining jurisdiction and rendering a decree binding upon the parties before the court, but without prejudice to others not brought into the case, observes as follows (quoting):

The doctrine of that case has been repeatedly affirmed and applied by the Supreme Court to cases in which the fact appeared that no final decision could be made between the parties to the suit and those represented by them without affecting the rights of absent, unrepresented parties. (Citing cases.)

In the case now before us the complainants' right to the injunctive relief prayer for necessarily depends upon the validity of the McGready lease. The quotation of its validity lies at the foundation of their right of action. If it is valid the complainants are entitled to no relief. If invalid, the complainants may be entitled to some relief. She is, therefore, within the rule referred to, an indispensable party to complainant's action. Her rights are materially affected by the decree made or by any decree that can be made in the case; and it cannot proceed without her."

McConnell v. *Dennis*, 153 Fed., 547, 549-50.

"We also think the record discloses the fact

that parties absolutely essential to the proper disposition* of the questions decided by the court below were not before it, and that consequently, even had the subject-matter of the controversy been properly within its jurisdiction, the court could not have effectively disposed of it. Neither the lessors of the complainants, nor of the defendant, were made parties to the suit, and yet the final decree disposed of the funds in which they were interested, and decided the title to the property which they claim to own in fee simple. It takes from the one and gives to the other set of claimants portions of the land claimed, respectively, by those not made parties. It adjudges that the complainants are the owners, by virtues of their leases for oil and gas, of the real property in dispute that is located to the west of a certain line, although such property is claimed in fee simple by the lessors of the South Penn Oil Company, who were not permitted to defend their titles. . The receiver is directed to turn over to the complainants the oil wells on the land so situated west of that line, thereby giving to complainants' lessors the royalty due from said wells, which is also claimed by the lessors of the defendant, the South Penn Oil Company. And again, the South Penn Oil Company is adjudged to be the owner of the wells found to be on the east side of said line, on land the title to which is claimed by the lessors of complaints, who are thereby deprived of the royalties due from the wells so given to the South Penn Oil Company.

Clearly these lessors are not deprived of their rights, or bound by said decree, nor are they estopped by it from litigating to protect their interests. Evidently the decree of the court below could not finally and effectually dispose of the controversy, as the lessors referred to were indispensable parties, and those claiming under it would hold defective titles.

It is apparent that these different lessors were not made parties for the reason that being citizens and residents of West Virginia, their presence would have destroyed the jurisdiction of the court. It is elementary that jurisdiction in the courts of the United States fails where all the parties on one side of the controversy have not a right, by diverse citizenship or alienage, to sue all the parties on the other side. Had the lessors of the South Penn Oil Company been made parties, the controversy would have been between complainants, who are citizens of West Virginia, and defendants, among whom were also citizens of that state. The court would then have declined to take jurisdiction. While it is true that in the federal courts certain rules relating to the joinder of parties do not apply in cases where such joinder would oust the jurisdiction of the court, *still, all parties who have such an interest in the subject-matter of the litigation as to render their presence ncessary in order to make the final decree effectual, are indispensable and must be before the court.*"

South Penn Oil Co. v. *Miller*, 175 Fed., 729, 736.

"Reaching the conclusion we do, that the holders of the common stock—one or more of such stockholders—should have been joined with the defendant below, and finding as we do that the decree complained of materially involves the interests of such shareholders, it follows, because of the well established rule that *no court can determine as to the rights of any party not before it, either actually or constructively, that the decree must be reversed.* In the controversy raised by the complainants, the company did not represent the common stockholders, and it is not in fact greatly concerned in it, nor essentially affected by the decree. That the stock was duly issued is not controverted; the insistence being not as to its issue or the legality thereof, but as to whether or not one class of the stockholders has a lien in preference to the other on the franchises and assets of the company."

Baltimore, C. & A. Ry. Co. v. *Godeffroy,* 182 Fed., 525, 535.

This court has said:

"The Supreme Court of the United States divide parties to suits in equity into three classes: *First,* formal parties; *second,* necessary parties; *third,* indispensable parties. 'Formal parties' are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in

the suit, and thereby prevent further litigation. They may be parties or not, at the option of the complainant. 'Necessary parties' are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may preceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. The reason for this liberal rule in dispensing with necessary parties in the federal courts will be presently stated. 'Indispensable parties' are those who not only have an interest in the subject- matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. (Citing cases.)

The general rule as to parties in chancery is that persons falling within the definition of 'necessary parties' must be brought in, for the

purpose of putting an end to the whole controversy, or the bill will be dismissed, and this is still the rule in most of the state courts. But in the federal courts this rule has been relaxed. The relaxation resulted from two causes: *First*, the limitation imposed upon the jurisdiction of these courts by the citizenship of the parties; and, *secondly*, their inability to bring in parties, out of their jurisdiction, by publication. The extent of the relaxation of the general rule in the federal court is expressed in the forty-seventh equity rule. That rule is simply declaratory of the previous decisions of the supreme court on the subject of the rule. The supreme court has said repeatedly that, notwithstanding this rule, a circuit court can make no decree affecting the rights of an absent person, and that all persons whose interests would be directly affected by the decree are indispensable parties." (Citing cases.)

Chadbourne v. *Coe*, 51 Fed., 479, 480-1.

Our contention, of course, is that Pearson and others mentioned "indispensable" parties. But even if they were only "necessary parties," in the language of the foregoing opinion they "must be made parties if practicable." In this case it was entirely "practicable" to make them parties, because all of them were within the jurisdiction of the court. That reason, therefore, for refusing to make them parties did not exist. And it was right that those persons who were interested

in the controversy should be made parties "in order that there may be an end of litigation." But it has already been shown that if one is an "indispensable" party, the fact that his presence would oust the jurisdiction of the court will not justify the court in proceeding in his absence.

> "The substantial object of the suit was to obtain possession of the bonds. The Deposit and Trust Company was the party in possession, and, although it claimed no interest in the bonds as against the plaintiff and its codefendant, yet possession could not be enforced in favor of the plaintiff except by a decree against it. Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensable (and not a formal) party. The case of *Wilson* v. *Oswego Township*, 151 U. S., 56, is decisive on this point."
>
> *Construction Co.* v. *Cane Creek*, 155 U. S., 283, 285.

If in an action to recover the possession of property "the one in possession is a necessary and indispensable party," it would seem clear by the application of the same rule that in an action to quiet in one in possession of that property the right to that possession, the one so in possession is likewise an indispensable party.

Davenport v. *Dows* was an action brought by

Dows, a stockholder in the Rock Island Railroad Co., in behalf of himself and other non-resident stockholders, to resist the collection of a tax alleged to be illegal. The bill alleged that the company had refused to take any action on the subject. The decree in favor of the plaintiff was reversed because the corporation was not made a party. The court said:

> "It would be *wrong*, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

Davenport v. *Dows*, 18 Wall., 626.

Also:

Rodgers v. *Penobscot Mining Co.*, 154 Fed., 606;
Sioux City Terminal R. & W. Co. v. *Trust Co. of North America*, 82, Fed., 124;
Coiron v. *Millandon*, 19 How., 113;
Ober v. *Gallagher*, 93 U. S., 204;
Williams v. *Bankhead*, 19 Wall., 563;
Board of Trustees v. *Blair*, 70 Fed., 414;
Lawrence v. *Times Printing Co.*, 90 Fed., 24.

(b) The General Church Case.

The proposition as to the necessity of bringing in parties not before the court is equally applicable to the General Church Case. A similar state of facts as to the absence from the case of indispensable parties was fully set out by leave of court (a plea having been overruled) in the answer. (Rec., pp. 556-627.) In this paragraph (No. 20) of the answer, each piece or parcel of property and each fund referred to in the bill of complaint is dealt with. The bill of complaint and its amendments describe the different properties in the State which the complainants sought to have affected by the decree, generally by reference to the book and page of the county record upon which had been transcribed the deeds which conveyed the title to the properties (Rec., pp. 7-10, 15-23, 26). In a few cases only did the bill or its amendments contain a description of the property. The answer, however, gave a complete legal description of each piece of property. This was Paragraph 10 (Rec., p. 553). That paragraph is omitted from the printed record because the same descriptions appear later in the answer in Paragraph 20 (Rec., pp. 556-627). The bill of compaint and its amendments, selected to respond for each piece of property certain persons named as defendants. Those persons were said to be representative of the class of persons who refused to recognize the merger (Rec., p. 7). As to each piece of property, the particular persons so selected as defendants were citizens of Missouri and sustained a peculiar and intimate relation to the given property involved; if it was a church

property, the persons so selected were either pastor, elders, deacons, officers or members of the society of the church or congregation worshipping in that particular church structure; in each case they resided in the immediate vicinity of the property and had been identified with it in the manner just stated. Generally, two or three were thus selected and they were alleged to represent all the persons in that neighborhood, members of the particular church or congregation who denied the validity of the union and who asserted that the particular property was still devoted to the uses of the original Cumberland Church society and congregation in that locality. It is conceded that the persons so selected were representative locally of the class to which they were alleged to belong.

The two complainants, Barkley and Roberts, are, respectively, citizens and residents of the State of Michigan and the State of Pennsylvania. The real controversy as to any particular church property was one between those members of that church or congregation, on the one hand, who recognized the validity of the union and claimed that thereby they were entitled to the possession and use of the property, and, on the other, those members of the same church or congregation who denied the validity of the union and, therefore, claimed that they were entitled to the possession and use of the old Cumberland church property. None of the persons belonging to that part of the membership of such a church or congregation which approved

of the union and had become Presbyterians and asserted themselves to be such, were parties to the suit. No person party to the suit represented that class. That portion of the old Cumberland Church membership and congregation in each locality which adhered to their faith was represented; the other portion, which approved the merger, was not represented at all. These two portions were in arms against each other, one struggling to retain, the other to obtain, the possession and use of the particular property. The contest and the quarrel as to the right to the possession and use of the property was between those two sets of people in that locality. They were, not only as respects the property involved, the natural antagonists; they were the real antagonists; and only one of the factions was represented by any party on the record and all the members of both these factions were citizens and residents of the State of Missouri, and resided in the immediate locality of the properties involved. Some of the properties were in the possession of one faction and some in that of the other. The larger part of them were in the possession of the Presbyterian faction.

This part of the answer gives the names of two or three persons in each locality, officers, deacons, elders, all members of the particular church or congregation belonging to that class in that locality who recognized the validity of the union, and who claimed that those who recognized such validity were entitled to the possession and use of the property, and named these

as real antagonists to those persons who had been made defendants by the bill. This part of the answer asserted that the persons so named were indispensable parties to the controversy as to that particular property and objected to further proceeding in the case until those persons were made parties and appeared before the court. It is conceded that the persons so named in the answer sustained to the various properties the relations therin set out and that they were as truly representative of the class in their several localities to which they were averred to belong as were the defendants, who had been selected by the bill of complaint, representative of their class. (Stipulation, Rec., pp. 34-6.)

As illustrative of the relations of the defendants and of the persons asserted to be indispensable parties to the suit to the properties involved, the situation in a few of the cases will now be cited. They are regarded as types of the larger number.

V. B. Robertson is, by the bill, made a defendant as representative of his class (Rec., p. 8). The property is the church at Blue Springs, in Jackson County, Missouri. In 1883 it was conveyed to William H. Jones, James N. Burris and Collins J. Dillingham, "as trustees for the sole and separate use of Blue Springs Cumberland Presbyterian Church, of the County of Jackson, State of Missouri, and their successors."

At the time of the alleged union, said Jones,

one of the trustees to whom the property was conveyed, was still a trustee, and was also an elder in the Blue Springs Cumberland Church, and R. J. Lowe was an elder in the church. Upon the union, said Jones and Lowe claimed to have become members of the Presbyterian Church, and are representative of the class of persons who belonged to the Cumberland Church at Blue Springs, who assert the validity of the merger, and who now claim to be members of the Presbyterian Church, and as such entitled to the exclusive use, occupation and control of the church property; and they are both citizens of the State of Missouri.

The property itself is in the possession of the defendant Robertson, who was and is also a member and elder of the Blue Springs Cumberland Presbyterian Church, and representative of those who refused to recognize the validity of the merger (Rec., pp. 563-4).

This is really a suit to recover possession of that property from the defendant Robertson. Jones, as trustee, was one of the grantees in the original conveyance, and the purpose of the bill is to oust Robertson and put in Jones, who, on the face of the deed, holds at least a part of the legal tile.

It seems to use that Jones was a necessary complainant in this action.

S. H. Gammill is, by the bill, made a defendant, as representative of his class (Rec., p. 9).

The property is the church at Marionville, Missouri. In 1891 it was conveyed to "George W. Rinker and S. H. Gammill, as the Board of Trustees of the Cumberland Presbyterian Church at Marionville."

When the alleged union occurred, Rinker asserted and claimed its validity and the title to and exclusive right to the use, occupation and control of the property. The defendant Gammill, one of the two trustees in the deed, was and still is a member of the Cumberland Church at Marionville, and is representative of that class of persons who dispute the validity of the merger (Rec., pp. 565-6).

The title, therefore, was vested in these two persons as co-trustees. The suit involves the right to the possession of the property. If one of these two, who denies the validity of the union and claims the right to the possession of the property, is a proper party defendant in respect of it, it is difficult to see why the other, who asserts the validity of the union and his claim to the possession of the property, is not an indispensable party. If it is right that one of two co-trustees in a conveyance be made a defendant, we submit that the court ought not to proceed to a decree until his co-trustee, who is opposing him, is on the record as an opposing party.

F. E. P. Harlan is made a defendant as representative of his class (Rec., p. 10).

The property is the church structure at Moberly. In December, 1869, it was conveyed to Chandler, Teadford and Walden as "trustees for the said Cumberland Presbyterian Church Society at Moberly." Afterwards Haynes and Ingram were elected trustees, and at the time of the alleged merger and union Harlan, Haynes, and Ingram were the trustees of the property. Haynes and Ingram asserted the validity of the union; Harlan disputed it.

Haynes and Ingram, with the class of persons of whom they are representative, claim the exclusive right to the use, occupation and control of the property, and exclude the defendant, Harlan, and his class from any use or occupancy thereof (Rec., pp. 571-2).

In this case, then, Harlan, one of the trustees in the deed, is made a party to the suit as a defendant, while the other two, Haynes and Ingram, co-trustees with Harlan, are wholly omitted. The purpose of the suit is to establish the right of Haynes and Ingram as against their co-trustee, Harlan. They are in possession and Harlan is out of possession. If Harlan is a proper party defendant, Haynes and Ingram are, it seems to us, indispensable parties complainant.

The controversy is between Haynes and Ingram on the one hand, and Harlan on the other.

Alexander Phoenix is made a defendant as representative of his class (Rec., p. 17).

The property involved is the church property at Knob Noster, in Johnson County. The defendant, Phoenix, is an elder in the Cumberland Church at that place, and he, with other persons denying the validity of the union, constitute a class of which he is representative, and are in possession and control of the property. At the time of the union, Bruce Shepard (who is averred by the answer to be an indispensable party to the suit) was also a member of the church at that place, and he and others whom he is said to represent, asserted the validity of the union and claimed the right to the title, possession and control of the property (Rec., p. 591).

Of these two classes, each claim the right to the use and occupation of the property. They are opposing parties. One class is represented by the defendant, the other, antagonistic class is not represented in the record at all. Shepard is a represntative of the opposing class and ought to be made a party.

John Neally is made a defendant as representative of his class (Rec., p. 18).

The property is the church at Stotts City, in Lawrence County. In 1904, it was conveyed to Turk, Moore and Downey "as elders and the local representatives of Stotts City congregation of the Cumberland Presbyterian Church of Stotts City." At the time of the union W. H. Smith (who is averred by the answer to be an indispensable party to the suit), was a member

and elder of that church. Upon the union he claimed to become a member of the Presbyterian Church, and asserted the validity of the merger, and is now a member of the Presbyterian Church and an elder in that church in Stotts City, and is representative of the class of persons who, at the time of the union belonged to the Cumberland Church at Stotts City and who now assert the validity of the union, and that they are entitled to the use, occupation and control of the church property. Neally is made a party as representative of those members of the church and congregation who deny the validity of the union. He was also an elder in that church, and he and his class are in the possession, occupation and control of the property (Rec., pp. 596-7).

The suit is one to take the property away from Neally and the class to which he belongs, and give it to the other class. A suitable representative of the class for whose benefit the suit is brought ought to be a party in any litigation against Neally and his class.

S. M. Fryar is made a representative of his class (Rec., p. 18). The property is the church at Walnut Grove, in Greene County. The deed, made in 1894, conveyed the property "to the Cumberland Presbyterian Church at Walnut Grove, Missouri." From that time until the time of the union it was in the possession of and used by the members and congregation of the Cumberland Church in that place for a house of

worship. At the time of the union Bradshaw, Baber and Creighton (three persons averred by the answer to be indispensable parties to the suit) were members and elders of that church. Upon the union they claimed to have become members of the Presbyterian Church, asserted the validity of the merger, and are now elders in the Presbyterian Church at Walnut Grove. They are representative of the class of persons who at the time of the merger belonged to the Cumberland Church at Walnut Grove and now assert the validity thereof, claim to be entitled to the exclusive use, occupation and control of the church property, and they and their class are in the exclusive use, occupation and control thereof, and exclude from such use, occupation and control the defendant, Fryar, who was before and at the time of the alleged union and still is a member and also an elder in the Cumberland Presbyterian Church at Walnut Grove, and the class of persons of whom he is representative and who deny the validity of the merger (Rec., p. 603).

Here one person, Fryar, who was an elder in the Cumberland Church at Walnut Grove, is made a defendant as representative of his class. The answer avers that three other persons, who were also elders in the same church, ought to be made parties. These three on the one hand, and Fryar, the defendant, on the other, represent their respective classes, who are in antagonism to each other, one class in possession and the other out of possession. The object of the bill is to

quiet the right to the possession in the class which now enjoys it, and to extinguish any claim which Fryar and his class may assert. If one class is represented, it is indispensable that the other should also be represented.

James Martin and William Foley are made defendants as representative of their class (Rec., p. 19).

The property is the church building at West Plains, Howell County. It was conveyed in 1890 to "the First Cumberland Presbyterian Church, incorporated, in the city of West Plains, County of Howell, in the State of Missouri."

Martin and Foley, the defendants, were members of that church and they, with others of whom they are representative, and who deny the validity of the alleged merger, are in possession of and using the same as a place of worship.

Hill and Thompson (averred by the answer to be indispensable parties) were, prior to and at the time of the merger and union, members of that church, and since that time they assert the validity of the merger, and are representative of that class of persons who agree with them in that opinion and claim that by virtue of the merger they and other members, of whom they are representative, are entitled to the title, possession and exclusive use of the church property (Rec., pp. 606-7).

Here, then, are certain persons, all of whom, with others of whom they are representative, were members of the church at West Plains. The membership divided into two classes: one asserting, the other denying the validity of the merger. Two persons, representative of the class denying such validity, and in possession of the property, are made defendants; their class is therefore represented. The other class, which avers the validity and claims the right to the possession of the property, is not represented at all.

XXVII.

The complainants, in neither case, were proper parties complainant.

(A) General Church Case.

The complainants in this case were James M. Barkley, a citizen and resident of the State of Michigan, and William H. Roberts, a citizen and resident of the State of Pennsylvania (Rec., p. 2; Stipulation, Rec., p. 636). All of the defendants were citizens and residents of the State of Missouri.

The controversy was one as to certain properties in the State of Missouri, most of them real properties and church edifices thereon.

Actions must be brought in the names of the real parties in interest. It is not denied that in certain cases in equity, where the persons in-

terested are very numerous and it would therefore be impracticable to make them all parties, a smaller number of persons may be selected as representative of those parties, either as complainants or defendants.

After the union, in very many of the places where there was a church, the membership and congregation of that church divided into two factions; one of them recognizing the union, the other disputing its validity. Those who were made defendants by the bill were said to represent that class in each local congregation which denied the validity of the union. This is, in fact, true. They did fairly represent that class. But the other class of the membership or congregation of that church, as has been fully stated, was not represented at all, as it ought to have been by one or more members of that class. A person who does not belong to a class cannot, as a party to the record, represent that class. Neither of the complainants belonged to the class. As has been stated, they resided in and were citizens of States other than Missouri. There is no pretense that they were members of any Cumberland Church or congregation, in whom resided the right to the use and occupation, as a place of worship, of any of the properties described in the bill of complaint.

While the principle of representation undoubtedly exists as a matter of equity practice, it constitutes an exception to the general rule that suits must be brought in the names of the

real parties in interest; and the persons put forward as representatives must be, in fact, representatives, and entitled to occupy that position in a suit. As the Supreme Court has said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue or defend on behalf of the many by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."

United States v. *Old Settlers*, 148 U. S., 427, 480;
Smith v. *Swormsedt*, 16 How., 288, 302-3.

If the membership of a church association or congregation have enjoyed what might be termed, broadly, the equitable title to a house of worship at all events the right and privilege of the personal use and occupation of that structure for the religious purposes of the association or congregation—such privilege or right of use and occupation constitutes in each member of that congregation a property right, which courts will recognize and protect; and if that association or congregation becomes divided into two factions, each of which claims for itself and its members the exclusive right of such use and occupation, each disputing the right of the other, in such case the members of the excluded faction may institute an action for the establishment and reinstatement of that right or privilege, and if

they be numerous a smaller number of them may commence such suit, as representative of all, against the members of the other faction, or, if they be numerous, a few of them, as representative of all. Such an action, courts will entertain because a property right is asserted and denied, and it involves a controversy which is the subject of judicial determination. But in no such case can a person who is a member of neither faction of such local church or congregation institute such action on his own account or as representative of others, any more than he could be made a defendant on his own account or as representative of the opposing class by the faction either in or out of possession.

Suppose a Cumberland Church membership or congregation at any given point in Missouri has divided on the question of the union; half of them asserting and half of them denying the validity of the union; half of them becoming Presbyterians U. S. A., and the other half claiming to still be Cumberlands. The denying faction are in the exclusive possession, use and occupation of the Church property, as a house of worship, and exclude the members of the other faction from such use. Could the members of the Cumberland faction, the one in possession, if Barkley and Roberts, the complainants here, citizens of Michigan and Pennsylvania, respectively, happened to come into the town in Missouri where this church is located, bring a suit in the circuit court of that county to quiet in the Cumberland faction the right to the posses-

sion, use and occupation of the church as a place of worship, make Barkley and Roberts defendants in such suit, as representative of the opposing faction, serve process upon them in that county, make no member of the local opposing faction a party to the suit, and then proceed with the case? It seems to us that no one would so contend. If, therefore, they could not be made *defendants* in an action which involves the right to the use and occupation of a local church property in Missouri—defendants as representative of the opposing faction—*neither can they appear as representative complainants* in a suit involving the same question.

By the word "interest," used in the expression "the real party in interest," already referred to, is meant such an interest are a court of law or equity will recognize; there must be some right or privilege incident to the ownership of that interest. Those being absent, there is no "interest" in the legal sense of the term. *A mere sympathetic interest will not suffice.* Its possession does not entitle any person to invoke, from any court, its protection. Doubtless these complainants, as members of the Presbyterian Church at large, entertain such "sympathetic interest" in the prosperity and advancement of that church everywhere, and to that extent it would have pleased and gratified them, as such members or officers of the church at large, to know or to see that that faction of the old Cumberland Church for whom they naturally felt a denominational affection, should succeed in its

pretensions and in its assertion of a right to the possession, use and occupation of church property which had formerly belonged to the Cumberland Presbyterian Church. *But that kind of an interest gives them no sort of standing in a court either of law or equity.*

In every case, so far as our knowledge, extends, where the right to the use of property formerly enjoyed by the membership or congregation of a local church, which has divided into factions, has been involved the person or persons who instituted the proceeding involving the controversy were *members of that local church or* now, interfered in such a controversy. *Such in-congregation.* No rank outsider has ever, until *terference is unprecedented.*

In *Watson* v. *Jones*, 13 Wall., 679, frequently referred to, in which a church property in Louisville was involved, all the complainants were *members of the Louisville church*, although they lived across the Ohio river, in the State of Indiana. (pp. 693-4.)

The complainants in this case are not fairly representative of those numerous local classes of persons claiming the numerous local houses of worship, here involved, against these respective defendants who are of the numerous opposing local classes. Indeed, they are not of any of those classes at all and cannot legally represent them or any of them in this litigation. They have no interest in common with any of those averred

to be indispensable parties, or otherwise, in any of this property. It is true they bring this suit in the three capacities stated in the caption of their bills; but in none of them can they represent the officers and members of any local Presbyterian Church U. S. A., in respect of any local house of worship, or other trust property here involved. They cannot, as moderator and stated clerk of the General Assembly of the Presbyterian Church U. S. A., stand for any of them; nor can they, as President and Secretary of the Executive Commission, stand for any of them; nor as individual members of local congregations in the States of Michigan and Pennsylvania. The local membership of local congregations in those States certainly have no interest in common with the membership of lacal congregations in Missouri in the houses of worship of the latter. What interest have the two complainants, or either of them, in the local church houses in the State of Missouri, in any of the capacities in which they sue? They are not named or included in any of the deeds as beneficiaries or otherwise, nor accorded any interest or control. They or members of any of these local congregations. Members in a local church is the only criterion of interest as a beneficiary in its house of worship. The interest begins with the membership, continues with it, and ends when the membership ends. No membership, no interest. This is familiar law.

These complainants are not of a class in a single instance with any of those persons who

stand in opposition to these defendants in respect of any of this property. They do not claim to be so. Then how can it be said that they are fairly representative of a local class of which they are not members, and of more than fifty local classes, in none of which they are members?

(B) *College Case.*

Neither the Synod of Kansas nor the individual complainants were proper parties complainant in this case.

The Synod of Kansas is a corporation existing under the laws of that State. (Rec., pp. 267-9.) *The corporation was created September* 22, 1909, shortly before the institution of this suit. The second paragraph of its charter contains a statement of its powers. It is as follows:

> "That the purposes for which this corporation is formed are to support public worship and education by exercising general supervision over the religious and educational affairs of the Presbyterian chuches, schools and colleges in Kansas, and holding and conveying of such real and personal property to which the title may be vested in it for the purposes of such support and supervision." (Rec., p. 268.)

It has no power, either by way of supervision or otherwise, over the religious or educational

affairs of churches, schools or colleges, except in the State of Kansas. It has no concern with educational interests outside of that State; no interest in the property of any educational institution in another state, and is not, therefore, a property party to a suit, either as complainant or defendant, involving the title or the right to the management or control of the Missouri Valley College, whose whole property is in Saline County in the State of Missouri.

Notwithstanding this fact, the District Court entered a decree in favor of this complainant (Rec., pp. 672-3). In this it seems to us there was manifest error.

Again, it is conceded that Pearson and others (claimed by the defendants to be indispensable parties to this bill), assert themselves to be trustees of the Missouri Valley College, selected and appointed as such by the proper authority of the Presbyterian Church. They are in possession of the property, exercising control and management of it and its affairs. The suit is brought to establish and quiet their title to such possession, management and control.

It is familiar doctrine that a trustee cannot delegate his power or authority. He must act for himself. It has even been held that one of two trustees cannot delegate his authority to his co-trustee. If this be so, these trustees could not authorize the Synod of Kansas, or any of the individual complainants, to bring this suit.

The trustees must do it for themselves, and in their own names. Nor can any other person, corporate or natural, with or without pretended authority from the trustees, bring any action in their own names on behalf of the trustees. Such authority would be invalid if attempted to be granted by the trustees. For this reason, none of the complainants can maintain this action.

XXVIII.

General Church Case.

The court should have dismissed the bill as to the Mount Carmel church property.

This refers to property in Henry County, Missouri, described in the bill of complaint (Rec., p. 10), in the answer (Rec., p. 573), and again in the answer (paragraph 22, (Rec., p. 621-2). It was a church property called the Mount Carmel Cumberland Presbyterian Church.

It is set up in the answer that action was brought by one of the factions in that church against the other, in the Circuit Court of Henry County, involving the title to the property, and that the decree in the circuit court was in favor of the old Cumberland faction—that is to say, those who disputed and denied the validity of the union—and by the decree the title was declared to be held in trust by the trustees for that faction; and that after the decree the persons representative of the Presbyterian faction, who had been in possession of the property, ac-

quisced in the decree and surrendered the property to their opponents, in accordance therewith (Rec., pp. 631-2.) The decree of the Circuit Court of Henry County was rendered November 5, 1909, about a month before the bill in the Henry County Circuit Court are found in the Record, pp. 652-665.

The contention of the appellants is that as to this property, there was error in the decree of the district court. The bill should have been dismissed as to that property and those of the defendants who represented it. This is the subject of assignment No. 18 (Rec., p. 697).

XXIX.

If not otherwise invalid, the alleged contract is invalid on account of fraudulent practices in the procurement of the same.

The answer further presents the defense that the submission of the basis of union to the presbyteries in 1904 was procured by fraudulent methods, and that, therefore, if the alleged contract of union is otherwise valid it is invalid upon this account (Rec., pp. 537-8).

This defense is based, first upon the fact that the time for taking the vote upon the Templeton resolution, which provided for the submission of the basis, was on Wednesday afternoon of the Assembly week, by special agreement of the contending factories in the assembly, set for the session of the assembly for the following

morning of Thursday, and notice thereof publicly proclaimed. That many of the commissioners thereupon or soon afterwards left the assembly room and did not return until the next morning (Thursday), when they were inattendance expecting to vote upon the resolution. That after the announcement above referred to had been publicly made, and after many of the commissioners present had left the assembly, with the understanding that the question would not be called for a vote until the next morning, the time for taking the vote was changed by those remaining to Wednesday evening, and the vote was thereupon had on Wednesday evening, without notice to those who had left and without giving them an opportunity of voting thereon. Among those who were thus deprived of voting were a number to the union (Rec., pp. 537, 328-340).

The defense is based, in the second instance, upon the following facts:

The Rules of Order for the General Assembly of the Cumberland church, as found in the Confession of Faith and Government of that church, provides the duty of the Moderator to be:

> "To give on all questions a clear and concise statement of the object of the vote, which, being taken, to declare how the question has been decided." (Rec., p. 328.)

That when the question of the adoption of the

Templeton resolution was before the Cumberland Assembly and the vote was about to be taken thereon, a delegate arose in his place and inquired of the Moderator as to the question, and whether or not it was intended that a vote in favor thereof should mean a mere submission thereof to the presbyteries for ascertaining the sentiment of the presbyteries, or whether it should also include a recommendation to the presbyteries that it be adopted, stating also that there were as many as 8 delegates surrounding him who were opposed to the union and who would vote against the submission if a vote therefor should be held to include its recommendation.

That thereupon, after a conference between the Moderator and the Stated Clerk, both of whom favored the union and the submission as well, the Moderator announced his answer to the query, stating that a vote in the affirmative for the resolution meant merely a submission of the question to the presbyteries, without any recommendation.

Similar inquires were made by various delegates from different portions of the assembly room and in each instance the Moderator gave the same answer as above indicated.

That thereupon at least 12 of the commissioners in the assembly voted in favor of the resolution who were opposed to the union and who would have voted against it, had it been under-

stood that a vote in favor of it included a recommendation of it to the presbyteries, and would thereby have defeated it (Rec., pp. 538, 328-340.)

It is now contended that the adoption of the Templeton resolution included a recommendation of the same to the Presbyteries and became final when approved by the presbyteries.

It is well-settled law that fraud in the procurement of a judgment invalidates the same.

Wabash R. R. v. *Merrielees*, 182 Mo., 126.

XXX.

MISSOURI CASES:

The case of Boyles vs. Roberts, 222 Mo., 613, has been cited often in this brief. This case was practically overruled in the later case of Hayes vs. Manning, 263 Mo., 1, after the personnel of the Supreme Court of Missouri had been changed Judge Burgess, Fox and Valliant who concurred therein having died. The authority of that decision in Missouri has been destroyed but the force of its reasoning and the correctness of the principles therein announced have not been destroyed. We consider them controlling. The learned Judge who wrote the opinion in the Boyles case was still a member of that court when the Hayes-Manning case was decided and he entered a vigorous dissent.

We believe that the principles announced in the Boyles case are sound and the conclusions reached are correct and just, and for that reason that they will commend themselves to this court and they are relied upon by appellants.

We do not believe that the reasoning of the Hayes-Manning case is sound or that the conclusions reached are just and correct and for that reason that it ought not to be followed by this court. We will now notice that case at some length.

The decision of the United States Circuit Court of Appeals did not decide nor purport to decide the questions of law arising in this case, further than to say that inasmuch as the Supreme Court of Missouri in Hayes vs. Manning, 263 Mo., 1, had overruled its former decision in Boyles vs. Roberts, 222 Mo., 613, wherein it had held the union of the two churches void, such action was very persuasive upon the writer of the opinion.

For that reason, it seems to us but fair that an analysis of Hayes vs. Manning, upon which the action of the Circuit Court of Appeals rests, should be made.

The opinion in Hayes vs. Manning is divided into seven sections indicated by the Roman numerals I to VII, beginning on page 27 of the official report.

From the beginning the opinion is replete

with misapprehension of the facts. On page 27 under (I) the judge rendering the decision states the contention of the Presbyterian party as contending that the union having been authorized by a two-third's vote of the General Assembly, the highest judicatory of the church and approved by a majority of the presbyteries, *in conformity with the requirements of the constitution*, the union became an established fact. The Court then proceeds to treat the assumption of the procedure having been taken in conformity with the requirements of the constitution as established, and the structure of the decision is built upon that assumed structure with no development of or ascertainment whether that was shown or not. The Court proceeds to build up a theory of constitutional power by inference from actions taken during the history of the Cumberland Church, which rests upon the misconception stated by the Court on page 21 of the existence of the constitution. It states (page 21):

> "In 1829 a General Assembly of the Cumberland Church was established. In 1883 this church promulgated a constitution and at the meeting of its General Assembly in 1906 it had grown in strength until it had a membership of 185,212, etc."

This is material in view of the long recitals made by the Court of resolutions passed by the original Cumberland Presbytery up to 1813 regarding the relations the three founders of the

Church had borne to the Presbyterian Church and some later negotiations looking to union with other ecclesiastical bodies as putting a construction upon the constitution of the Cumberland Church authorizing a union of the kind attempted to be consummated here.

The statement that the Church promulgated a constitution in 1883 is a total misapprehension of the facts. The record shows that the church adopted its constitution at the meeting of its first General Assembly in 1829, and this constitution was entirely silent upon the matter of union. It is true that under the constitution of 1829 negotiations were had as set forth in the opinion and in the light of them and to govern such matters in the future, the Constitution was *amended*, not promulgated, in 1883, and in the amended constitution for the first time, in section 43, power was conferred on the General Assembly,

> *'To receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church."*

And at the same time, and as a further innovation in the constitution in connection with this matter in Section 25 it was further provided,

> *"And the jurisdiction of these courts is limited by the express provisions of the constitution."*

The only move of any kind made after the adoption of this amended constitution, and the above strict constitution limitation upon, was to consider a suggestion made for consolidation with the Methodist Protestant Church, but this suggestion never reached the stage of discussion of detail, and the matter never reached the members, so that, certainly, it is a palpable *non sequitur* to assume that the consideration of the suggestion, with no details coming before it directly in conflict with these provisions of the constitution can operate as a waiver by the individual members of the church of their inherent rights the reunder or to waive the protection of the constitution.

And practically the entire opinion then is built up upon the erroneous conclusion deduced by the Court from its misapprehension of fact as to constitutional powers. It is submitted that it is the necessary inference that if the negotiations had during the period from 1829 to 1883, and during the weak and struggling period of the Cumberland organization, operated to put any interpertation upon a Constitution, it must have been upon the Constitution of 1829 which was wholly silent upon the matter of union, and that then the adoption of the amended constitution of 1883 which conferred power upon the General Assembly.

"TO RECEIVE UNDER ITS JURISDICTION other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church."

and at the same time adopting the further provision that

> "THE JURISDICTION OF THESE COURTS IS LIMITED BY THE EXPRESS PROVISIONS OF THE CONSTITUTION."

must necessarily operate to supersede and for naught hold whatever interpretation arose prior to the adoption of the amendment of 1883.

And it is further submitted, that the mere fact that a committee was appointed to confer with the Methodist Protestant Church, upon the matter of some plan of union in 1885, which came to naught as appears from the record because the latter body refused to consider the matter, can not be urged as an interpretation of the Constitution, warranting the final action taken here. Besides this Committee recognized that the Constitution only permitted the Church to receive under its jurisdiction other ecclesiastical bodies and recommended that the confession of faith of the Cumberland Presbyterian Church be adopted (R., 55). It will be presumed that the action proposed to be taken was an action conformable to the constitution then in force whereby the Cumberland Church was to RECEIVE UNDER ITS JURISDICTION this other ecclesiastical body, and as the other ecclesiastical body refused the overtures, it is the further inevitable conclusion, that it was unwilling to be RECEIVED UNDER THE JURISDICTION of the Cumberland Church. And

further than that, it is submitted that the mere consideration of a proposed action, never reaching the stage even of discussion of details does not operate as an administrative construction of a constitution or statutory provision. Had the Cumberland Church after the adoption of the Constitution of 1883, actually merged itself with other ecclesiastical bodies IN THE MANNER FOLLOWED IN THIS PROCEEDING, and its individual members acquiesced therein, that and that only could have operated to put a construction upon the constitution and practices of the Cumberland Church. Such is the universal rule of administrative construction of either constitutional provisions or statutory enactments, and wholly overlooked in the case of Hayes vs. Manning, *supra.* The decision was and is further in ereror when it is said (p. 29) after reciting the various attempts made—"The absence of protest against these repeated efforts towards union of which the membership had no notice, is proof that they met with general approval."

As above shown, the Church as a whole did take notice of these repeated efforts and upon taking such notice, in 1883, prescribed what should be done and to what extent such efforts should be made by giving the General Assembly power to receive under its jurisdiction other clesiastical bodies,—which as an expression of power conferred, necessarily excluded other powers or methods. *'Inclusio unius, exclusio alterius.'*

On the same page, the decision further misconceives the record when it, by inference, holds that the general assembly had not only executive and legislative power, but judicial power as well. Its judicial power was strictly limited to doctrinal and ecclesiastical matters, regularity of church procedure and regularity of proceedings had by the inferior bodies upon matters within their respective jurisdictions. There was nothing in the Constitution to confer upon the General Assembly or any other body of the church authority to decide that it had the power which rested in the individual members of the organization, much less to warrant the conclusion in the Courts of law that by its presuming to exercise such power in one single instance, without warrant therefor that such action is a judicial determination of its right so to do. As well may it be said that the action of Cromwell in dismissing the Parliament was a judicial determination of his right so to do, or the levying of taxes by Charles in defiance of Parliament was a judicial determination of his right in that respect.

These things being true, it follows that the structure of the holding in Hayes vs. Manning, that the individual members of the Cumberland Church are bound by whatever thing of any kind that the General Assembly may see fit to do, are bound thereby can not stand, and is not an authority binding upon this Court, or even persuasive.

The conclusions in paragraph IV of the opin-

ion, (beginning on page 34) are likewise bottomed upon a misconception of the facts and are therefore, necessarily, untenable. The major premises is that there is no provision in the constitution prohibiting union by the Cumberland Church with another whose faith is in harmony with its own. This entirely ignores the maxim that the expression of the one is the necessary exclusion of the others. As above quoted, the Constitution vests the General Assembly, with the approval of the Presbyteries, to receive within its jurisdiction other religious bodies. Whatever may be the power of the Church as a whole reserved to its several units, this is the limit of the power vested in these representatives bodies. But conceding that there is no express provision prohibiting the union by the church with another of a similar faith and practices, this is a far cry from the conclusion reached that, therefore, it necessarily follows that the General Assembly and Presbyteries, have power to accomplish such union, and especially against the will of the large majority of the individual units. For that reason the comments of the Missouri Supreme Court (page 35) are inappropriate and immaterial.

The Court says (p. 35):

"The contention of those who oppose union is that this section (the one providing that the General Assembly shall have power to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the

doctrine and order of this church) while authorizing union by the General Assembly with a smaller organization, does not include the power to unite with a larger church and to take its name and ecclesiastical organization as its own. The comment on this contention by counsel for appellants in Wallace vs. Hughes, *supra*, is so appropiate that we do not deem it improper to quote the substance of same:—

> 'We are unable to understand the refinement of construction which admits that the Cumberland Assembly has the right to permit other churches to unite with it, yet had no right to allow it to unite with others; this is much like saying it is lawful for a man to wed but it is not lawful for any one to wed him. As we understand the contention of those opposing this union, it would have been regular if the uniting body had taken the name of the Cumberland Church and it had been a smaller organization than the church with which it became united."

The Court wholly misconceives, not only the contention of those opposing the union in that case, but the entire opposition to the union, made before every Court before which the matter has been tried.

It has never been contended that the Cumberland Church could not merge itself with another similar body. It perhaps had inherent power to do so. But such inherent power must either be exercised either by the individual units forming

the body,—the members themselves,—or, if by any representative bodies, then such bodies as have the power specifically conferred upon them. The comment adopted by the Missouri Supreme Court above quoted, comparing to the right to matrimony by a man as not authorizing another to unite in marriage with him is absurd. The true analogy would be based upon the power of the Congress of the United States. Power is conferred upon the Congress to admit territories into the Union as States. To say, then, that that power, thus conferred would permit or warrant the Congress by a mere Act passed by a majority of both houses and signed by the Presdent to merge the whole government of the United States into the Republic of Mexico, or that of France or any other government similar to ours, would be an exact statement of the inference drawn by the Missouri Court in Hayes vs. Manning,—and the mere bald statement of the proposition thus reduced and illustrated is its most thorough refutation, and demonstration of the fallacy in the case counsel urge as binding upon this Court. But, when it is considered that although plainly and repeatedly shown in the record that the Cumberland Church adopted its Constitution at its General Assembly of 1829, which continued in force until 1883, when it was amended to limit specifically the powers of the General Assembly, and the manner of uniting with other bodies, by "receiving them under its jurisdiction", the Court repeatedly iterates and re-iterates (as on page 36) that "Although organized in 1810 it did not at-

tempt to adopt a constitution until 1883" and say this constitution so then for the first time adopted was the act of the General Assembly, the ignorance of the Court upon the matter before it will be understood.

Upon the matters raised in Parapragh V of the opinion concerning the right of civil courts to pass upon the meaning of the creeds of the Church, it is conceded that within the purview of matters affecting the meaning of the creeds, and details of forms and practices within an ecclesiastical body, the church judicatories have jurisdiction, and their findings are binding upon the Courts. Such questions arise in determination of the rights of members to retain their standing in churches where property rights are not involved, the rights of facations to use and occupy church properties when the right there to depends upon the teachings, and schisms have been had, the rights of ministers to occupy their pulpits to teach doctrines claimed to be inharmonious with the doctrines of the given church, etc. And the authorities cited are of cases decided when such matters have been before the Courts. Such cases do not apply upon the issues raised in all the litigation growing out of the matter now at bar. But even if it did, it would be a sufficient answer to say that in any event that question is not proper. In this case as it appears from the record, the General Assembly of the Cumberland Church at no time made any finding upon the matter of the meaning of the

creeds of the churches, but simply proceeded to vote upon and declare the union of the churches.

The Court in this case has fallen into the singular error of announcing the hard and fast rule that civil courts will not inquire into matters of creed and doctrine though property rights are involved; yet the Court places the right of union between the two churches on the ground that the Cumberland Church was united "with another church of a similar faith and government, but different name." We are unable to understand how the Court determined that these churches were of similar faith and government if it did not inquire into or examine their creeds. The Court overlooks many of the material and controlling matters embraced in the opinion in Boyles vs. Robetrs. They overlook the fact that such portions of the plan of union which referred to the legal, corporate and property rights of the Cumberland Church, and such portions as contemplated and required the extinguishment of the jurisdiction of the Cumberland Church, and the merger of the same into the Presbyterian Church, were never submitted to the presbyteries of the Cumberland Church for their approval or rejection, but that the validity of the same rests wholly upon the authority of the General Assembly. The Court overlooks the facts that the effect of the scheme in question is the extinguishment of the jurisdiction and organization of the Cumberland Church, and the merger of that church—together with its membership and property—into the jurisdiction of the Presby-

terian Church, U. S. A. The Court overlooks the further fact, that said scheme of union involves the involuntary transfer of the membership of the members of the Cumberland Presbyterian Church to the Presbyterian Church, U. S. A., and the enforced acceptance of membership in that church by the former members of the Cumberland Presbyterian Church. The Court overlooks the fact that the doctrines and creeds of the two churches are at such variance, the one with the other, as to preclude the union in question, under the laws of the land, by reason of the fact that to unite the one with the other, or to merge the one into the other is to destroy the trusts upon which the respective properties of each were acquired and are held.

The Court further overlooked the fact that in all the history of the Presbyterian Church, U. S. A., it has never given any practical constitution of any such power under its constitution as enables its General Assembly to surrender the jurisdiction of that church, and merge it into some other body. It has never, in its negotiations with other church bodies, surrendered the jurisdiction of its own organization, but has always maintained it.

The Court, in the last mentioned cases, proceeded upon the theory that because the General Assembly and the presbyteries of the Cumberland Church had amended and adopted the constitution of 1883, therefore, they were constitution makers, acting upon implied or inherent

powers. In doing so, it overlooked the fact that the constitution was made, in the first instance, upon the organization of the church, by the assent of those who became members thereof, and that the power of amendment given to the General Assembly and presbyteries is a power which they have derived through the constitution from the membership.

The Court, in holding that the General Assembly of the Cumberland Church had implied power to effect the union, overlooked the further fact that there is no express provision in the constitution of the Cumberland Church for the making of a union of the character in question with the Presbyterian Church, or other church body, and nothing from which an implied power might spring.

Appellants, therefore, for the reason stated, respectfully submit that the decrees of the District Court are wrong and should be reversed and that the decision of the United States Circuit Court of Appeals affirming the decrees of the District Court should be reversed and the causes remanded with directions to dismiss the bills of complaint.

Respectfully submitted,

CHARLES E. MORROW,

Solicitor for Appellants.

MAX D. ABER,

Of Counsel.